THE GOVERNMENT OF THE FREE STATE OF BAVARIA

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Abbreviations

AöR	Archiv des öffentlichen Rechts
DJZ.	Deutsche Juristenzeitung
GO.	Geschaftsordnung für den bayerischen Landtag
HdbDStR	Handbuch des deutschen Staatsrechts
JöR	Jahrbuch des offentlichen Rechts
LWG.	Landeswahlgesetz
R. D. P	Revue du droit public et de la science politique
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen•
RV.	Die Verfassung des Deutschen Reichs vom 11 August, 1919
StGHG.	Bayerisches Staatsgerichtshofgesetz vom 11. Juni, 1920
VU.	Verfassungsurkunde des Freistaates Bayern vom 14. August, 1919

PREFACE

Three phenomena characterize a revolution: a popular movement, suspension of the old constitutional order, and, primarily, the enthronement of a new political system In the great period of constitution making in Europe that followed the World War, parliamentary government, the triumph of the representative principle in politics, was almost universally accepted as part of the new machinery of republicanism. The constitutions of the German Reich and the Länder also chose the parliamentary régime as the expression of the doctrine of Democracy Triumphant that had opposed the Wilhelmian era

The National Socialist revolution of 1933 brought on a bold change from the agnostic democratic state of political relativity to a *democrazia organizzata, centralizzata, autoritaria* (Mussolini) The Hitler movement and the Fascist Revolution of 1922 disproved the bourgeois-liberal notion of the nineteenth century that a popular movement, by revolt of the oppressed classes against their masters, must lead to the perfect and perennial form of representative government. The realization of liberty, deliverance from inherited state and social fetters, security of independent, free and responsible participation of the individual in national life are not the values sought. German revolutionary forces posited other problems In the foreground stands the sympathy of the young generation for a strict régime based on the Nation's history and mission, national pride, honor and freedom. Opposed to the revolution from the "left"

which the theories of the nineteenth century exclusively envisaged, is the *rivoluzione dello Stato* (Corradini) or the *Revolution von rechts* (Freyer) as that type of an upheaval in which the state is raised to the central position of political pantheism and in which the all-powerful, totalitarian state attempts to eliminate social distinctions among sections, factions, castes or classes.

In the pages that follow, we shall refer to the royal Bavarian constitution of 1818, examine the legal structure which the Fathers of the Bavarian republican constitutional system intended to set up, point out some antinomies between the texts of the constitutional laws, on the one hand, and the dynamics of political life on the other, study the plan of government for the period 1919-1933, and briefly discuss the Bavarian People's Party

The literature available in New York City on the Bavarian constitution of August 14, 1919 (or the Bamberg constitution as it was christened in honor of its birthplace) is fragmentary Shortcomings in the intensity of the study which a critical reader will at times detect might be attributed to this factor. Certain phases of Bavarian constitutional life have been treated in English literature before — and in part extensively and with great skill — and only references have been made thereto without further discussion. The space allotted to this work has not permitted an elaborate citation of authors on general topics or on certain aspects of the German National constitution. Any selection is arbitrary to a degree, an omission of well-deserving authors is not intended as a reflection on their merits and calls for an apology.

I wish to express my gratitude to Professor Lindsay Rogers, of Columbia University, under whose guidance and supervision this work was undertaken and completed Professor Arthur Whittier Macmahon, of Columbia University, has read over the manuscript and has offered many valuable criticisms which I have incorporated in the work To Mr. Sanford Schwarz I owe a debt for careful scrutiny of the whole book In the preparation of the manuscript many suggestions were made by Mr Moses I. Finkelstein and for these also I make grateful acknowledgment.

§1 A. *THE NATIONAL REVOLUTION OF MARCH, 1933 IN RELATION TO BAVARIA*[1]

The German National Revolution of March, 1933 and its progeny, the Enabling Act of March 24, 1933,[2] created the "National Rechtsstaat".[3] For the National Revo-

[1] The population of Bavaria in 1925 was 3,553,857 male, 3,825,737 female inhabitants 43,8% of this population was devoted to agriculture, 33,7% to industry and the handicrafts, 12,6% to commerce and trade, 4,4% were engaged in the administration, army, church and liberal professions, 1,6% in the sanitary service, 3,9% in domestic service Area 27,210 sq m east of the Rhine, 2,124 sq m. west of the Rhine (without the Saar district)

The relation of financial strength between different Länder is shown through the following comparison between percentage of population and percentage of income tax Bavaria 11,8 8,5% Prussia 61,1 60,3, Saxony 8,0 . 11,3, Hamburg 1,85 4,2 Bühler in *HdbDStR* 1, p 338.

[2] *Cf.* an English translation in *Current History* (May, 1933), p 233

[3] Koellreutter, Otto, "Der nationale Rechtsstaat", *DJZ* (April 15, 1933), pp. 517 *et seq*

"The bourgeois Rechtsstaat is concerned only with the legal security of the individual, and the preservation and protection of such a condition, the national Rechtsstaat demands priority for the safety of the national 'order" The same, "Der nationale Rechtsstaat", *Recht und Staat* (1932), vol 89, p 35

"The national Rechtsstaat, as the deliberately chosen political form of the state regulating the life of the people taken as an ethnic

lution bears a genuinely revolutionary stamp[4] in so far as is involved a deliberate change from a bourgeois-liberal German state to a German national state of consciously authoritarian character. The constitutional structure of the new German state is anti-liberal and no longer expresses that bourgeois individualism which was sapped away by the after-war fundamental changes in its sociological presuppositions.

A transfigured and politically unified Reich presents itself to Western eyes Of all the triumphs achieved by Hitlerism none is more notable than this German unity. The remnants of the "sovereign" rights of the Länder were swept aside and all political power concentrated in the hands of the National government. Thus was completed the work begun by Bismarck in 1871. From being a more or less loosely federated political unity, Germany became politically one of the most highly unified coun-

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unity (*die bewusste Form einer volklichen Lebensordnung*), also recognizes the value and sanctity of law, with the proviso, however, that the constitutional structure and safety of the national order have a prior claim Therewith the theory of the national Rechtsstaat intentionally affirms the polarity of power and law and a tensile relationship between the two Such a theory stresses both poles and thereby avoids the one-sided torture of excessive legislation practised by the immoderate liberal Rechtsstaat Power and law are consciously recognized values of the national Rechtsstaat" The same, "Vom Sinn und Wesen der nationalen Revolution", *Recht und Staat* (1933), vol. 101, p 12

Hans J Wolff, "Die neue Regierungsform des Deutschen Reiches", *Recht und Staat* (1933), vol 104, calls the Third Reich *"einen solialistischen ständischen Volksstaat"* (p 12), an authoritarian democracy (p 39), a representative diarchy (p. 41)

[4] *"Una rivoluzione, in realtà, non merita tal nome, se non mette capo ad un nuovo sistema di diritto pubblico e ad un nuovo spirito del popolo . . La rivoluzione . è sopratutto un rivolgimento politico o sociale, ovvero politico e sociale insieme, quindi un processo storico, che mette capo a un nuevo ordinamento dello Stato o della Società o di ambedue"* Rocco, Alfredo, *La Trasformazione dello Stato* (Roma, 1927), p 6

tries in the world. If this achievement is permanent Adolf Hitler will have done for Germany what Richelieu accomplished for France.

The quest of unity has preoccupied German leaders for generations It was the *leitmotif* of German history. The hitherto elusive goal of unity seems now to have been reached. The passions of nationalism appear to have welded Germany together more firmly than ever before Bismarck's three wars of blood and iron created only a degree of unity, but Hitler — and this is what baffles the old practitioners in politics who stand about much in the attitude of a *vieux sabreur* wondering how the untrained fencer can display such skill — by a bold revolution which won the bulk of the population to its support achieved a unity that was beyond the reach of Bismarck. It is the "Nazi mentality" which sedulously strives for national unity, and that mentality is a product chiefly of the German sense of frustration and inequality. It grew out of brooding nationalism and social discontent, out of the war-guilt clause and the disparities of the peace treaty, out of the war indemnities and the inflation which undermined the position of the middle class and bled it white.

The "national revolution", a *brutum fulmen* to century-old differences between the various parts of Germany, has attempted, in the name of the Nazi "coordination program", to assure unity of policy in all political and economic affairs between the Reich and the Länder. The revolution has laid a new constitutional foundation for the relations between the Reich and the Länder and has revised the fundamental structure of the Weimar constitution. Still, the autonomy of the Lander has been preserved and continued; far-reaching scope has been given

to their colorful diversity in geographical, racial, historical and social peculiarities. The "unitary" Reich has not been made synonymous with a "centralized" Reich [5].

The Coordination Law of March 31, 1933 (*Vorläufiges Gesetz zur Gleichschaltung der Länder mit dem Reich*) [6] and the Second Coordination Law of April 7, 1933 (*Zweites Gesetz zur Gleichschaltung der Lander mit dem Reich,* abbreviated as *"Reichsstatthaltergesetz"*) [7] set in striking relief how much the formation of the supreme will in the Lander is governed by the Reich's good graces through the medium of the Reichsstatthalter. What former governments had to carry along the difficult road of parliamentary debate and were not able to accomplish by protracted negotiations and lengthy resolutions, the Nationalist government achieved by one stroke of the pen and imposed by its mere fiat. There will be no more of the political antagonism between the Reich and the Länder which in the past engendered serious political conflicts. In all directions the limits set by the Weimar constitution to the political influence of the Reich on the Lander have been removed

What use or abuse will Fascism make of its power?

[5] The idea of the decentralized unitary state was the goal not only of Preuss, based on the *Genossenschaft* theory, but also of Anschütz and Triepel, followers of Georg Meyer, in the dominant schools of German jurisprudence. The opposing views of the Bavarian jurists Beyerle and Nawiasky are recorded in §3 (3 n. 17), *infra Cf* Mogi, Sobei, *The Problem of Federalism* (London, 1931), vol. II, pp 964 1092-1093.

[6] *Reichsgesetzblatt* I, no 29, p. 153. *Cf.* Kaisenberg, Georg, "Gleichschaltung der Lander mit dem Reich", *Das Recht der nationalen Revolution* (Berlin, 1933), Heft 2

[7] Reichsgesetzblatt I, no. 33, p 173. *Cf.* Schmitt, Carl, "Das Reichsstatthaltergesetz", *Das Recht der nationalen Revolution* (Berlin, 1933), Heft 3, Bilfinger, Carl, "Das Reichsstatthaltergseetz, *AöR* (1933), N. F. 24, pp. 131 *et seq.*

The Reich Reform Bill of Jan 30, 1934 is referred to in §10, n 1, *infra.*

It is too early to say what pattern the loom of the popular resurgence which is now at work in Germany will create from the warp of Racial Nationalism and the woof of Social Economic Collectivism, what new fabric it will weave in the final relations between the Reich and the Länder

But even if the Weimar constitution of August 11, 1919 should be completely destroyed, the Bavarian constitution of August 14, 1919, which we shall present in the following chapters as it was in force before the Coordination Laws were enacted, would remain a document of historical and political interest.

§2 B. *FROM THE ROYAL CONSTITUTION OF 1818 TO THE REPUBLICAN CONSTITUTION OF 1919*

The first South German prince, after the Napoleonic period, to grant a written constitution to his people was Maximilian IV Joseph of Bavaria Imbued with the liberal-democratic spirit which, originating in the French revolution, flowed over the Rhine into the country like a torrent, the King, on May 26, 1818, changed the absolute monarchy into a constitutional one. The bicameral Landtag represented, together with the King, the State's will

In the constitution the King allocated to himself a decidedly preponderant position Despite these constitutional provisions, political developments permitted the Landtag to exercise a powerful influence. The shifting in strength is explained by the debility of the Kingship which resulted from the mental incapacity of its incumbents and from the regency. In the conduct of the State's affairs the various ministries came to depend in greater measure on the assent of the Landtag than the letter of

the constitution required. At any rate, no intolerable restriction of the rights of the people existed. From this standpoint the outbreak of the revolution of 1918 did not have any foundation in Bavaria.[1]

For a century this constitutional edifice had weathered all storms [2] Only the World War, with its tremendous changes in the ethos of the German people, rocked it to its foundation, while the revolution of 1918 utterly destroyed it. King Louis III tried in vain to stem the revolutionary tide by introducing on Nov 2, 1918 a responsible parliamentary government On Nov. 7, 1918 the revolution broke out [3] The temporary revolutionary government, on Nov. 8, 1918, declared Bavaria to be a republic and the Wittelsbach dynasty to be dethroned. In a manifesto to the Bavarian people the government promised to have the people's representatives convened as quickly as possible However, only the pressure of the population finally induced the revolutionary leaders to redeem their promise On Jan 12, 1919 the new Landtag was elected in Bavaria east of the Rhine, and on Feb 2, 1919 in the Palatinate. On March 17, 1919 the Landtag promulgated a Preliminary Constitution which superseded the one that had been decreed by the provisional

[1] Nawiasky, Hans, *Bayerisches Verfassungsrecht* (Munchen, 1923), p 7

[2] The following exhortation of Professor Piloty, the co-author of the Bamberg constitution, makes piquant reading "The constitution, the anniversary of which we Bavarians celebrate to-day, is still for us a potent source of law . May it be the instrument that stimulates harmoniously to develop all political forces of the country, sovereign and people, for the benefit of the State." *Hundert Jahre bayerischen Verfassungslebens* (Würzburg, 1918), pp 29-30

[3] Meinecke in *HdbDStR* 1, p 108 On the revolution see e g., Meinecke, *loc. cit*, pp *95 et seq*, Jellinek, "Revolution and Reichsverfassung", *JoR* (1920), vol. 9, Lutz, Ralph Haswell, *The German Revolution 1918-1919* (Stanford University, 1922). Each author gives an extensive bibliography.

government on Jan. 4, 1919. The framing of the ultimate plan of government was to be undertaken at once. Riots, particularly the installation of a Soviet régime in Munich, retarded the tasks of the Landtag so that it was only on Aug. 14, 1919 that the Republican Constitution, drafted by the privy councillor Dr von Grassmann and Professor Piloty of Würzburg,[4] was finally born.[5]

C. PRINCIPLES OF THE BAVARIAN CONSTITUTION

§3 *Bavaria as a member of the German Reich*

1 UNITARY TENDENCIES OF THE WEIMAR CONSTITUTION The constitutional structure of the Reich which the German people salvaged out of defeat and revolution, and, as the preamble to the Weimar constitution declares, renewed and consolidated in liberty and justice, underwent a complete metamorphosis at the hands of the Weimar assembly Much as opinions differ about the Weimar constitution according to the political, economic, social, national, juristic, and esthetic outlook of the critic, there is unanimity about one factor· nobody has honored it with blind worship[1] The Bismarckian constitution was the palpable testimony to the resurrection of Kaiser and Reich in proud grandeur and superb majesty, the shining symbol of the fulfilment of ardent National aspirations The Weimar constitution, to para-

[4] Scientific literature covering the drafts of the constitution does not exist Piloty, "Bayerische Verfassung", *JoR* (1920), vol. 9, pp. 147-148 Professor Piloty also was a deputy and belonged to the Democratic party Other deputies, who reported to the Landtag, were the Socialist Ackermann and Dr Held (Bavarian People's Party).

[5] Nawiasky, *op cit.*, p 15

[1] *Cf* e g, Gaudefroy-Demombynes, "La Fragilité de la République allemande", *Rev Pol. et Parl* (Dec 10, 1931), p 403 « *Le régime de Weimar, né de la défaite, n'a été accepte que pour les services qu'il pouvait rendre, mais n'a jamais été ratifié dans le cœur d'un Allemand, quel qu'il soit* »

phrase the late Mr. Strachey, was a child of worry, with many somatic ailments. This is hardly matter for wonder as the Weimar constitution was brought to light in nine months of complete external débâcle and severe psychic disturbances.[2]

One of the sensitive spots of the Weimar constitution was the relationship of the Reich to the Länder[3] Nothing was more significant for the alteration of the political foundations of the Reich than the position which the constitution assumed in regard to the problems of the existence and integrity of the Lander.

A decided unitary tendency appeared in the Weimar constitution. The constitution put in particularly well-marked relief the statehood of the Reich as that of an independent National State that differed from the sum

[2]Nawiasky, Hans, *Die Grundgedanken der Reichsverfassung* (München-Leipzig, 1920), p. 7.

[3] The Weimer constitution generally speaks of the members of the Reich as "Länder". Professor Kahl, a member of the committee on the constitution, reported to the National Assembly "The majority of the committee selected the expression 'Land' which for some time has been connected with constitutional organizations . . The heading, 'Reich und Lander', using the latter term in the meaning of member states, contains . from the point of view of constitutional law the assertion that the state organism to be created by this constitution does not represent a unitary state, but as heretofore, a combination of states" Mattern, Johannes, *Principles of the Constitutional Jurisprudence of the German National Republic* (Baltimore, 1928), pp 164-165, Mogi, Sobei, *The Problem of Federalism* (London, 1931), pp 881-882, Anschütz, Gerhard, *Die Verfassung des Deutschen Reichs vom 11. August, 1919* (Berlin, 1929), pp. 27, 34-35

Par. 1 VU. styles Bavaria a *"Freistaat und Mitglied"* of the German Reich. The word *"Mitglied"* has a more federalistic connotation than *"Glied"*, an expression some other constitutions use (e. g Prussia). v Jan, Heinrich, *Bayerische Verfassungsurkunde* (Munchen-Berlin-Leipzig, 1927), p 17

On Bavaria's position during the framing of the Weimar constitution see in English literature, e g Finer, Herman, *The Theory and Practice of Modern Government* (London, 1932), pp. 358, 360, n i; Mattern, *op cit.*, pp 125-128, Mogi, *op cit.*, pp. 896-898.

total of a federation of member states.[4] In view of the very considerable increase of the Reich's activities and the reduction to puny stature of the member States, some constitutional jurists were of the opinion that the Lander had lost their statehood and could be regarded only as autonomous administrative districts.[5]

If it were just a question of classification of the Lander under more or less arbitrarily erected abstract categories, one could dismiss the task as being only "*une querelle allemande*". However, it is neither a political, nor even a juristic game of battledore and shuttle-cock whether constitutional jurisprudence styled the Reich a federal or unitary state, — whether it allowed the Länder statehood or not "In such terms and concepts", says Thoma,[6] "significant imponderables of sentiment and will vibrate, which a practical jurisprudence, seeking consonance with popular feeling and contact with actual life, is not allowed to disregard. Effects of a word are involved which, by a restrictive or explanatory definition, cannot be eliminated, just as the artillerist cannot avoid the undesired scattering of his bullets."[7]

If the view be adopted that sovereignty or "independence of the state from powers which are above and out-

[4] Anschutz, Gerhard, *Drei Leitgedanken der Weimarer Verfassung* (Berlin, 1924), pp 5, 11

[5] An anthology of opinions is given by Thoma in *HdbDStR* 1, p 170 *et seq* On the problem of "statehood" of the Länder see in English literature. Emerson, Rupert, *State and Sovereignty in Modern Germany* (Yale University Press, 1928), pp. 236 *et seq*; Kraus, Herbert, *The Crisis of German Democracy* (Princeton, 1932), pp 107 *et seq*, Mattern, *op. cit*, pp 341 *et seq.*

[6] *Loc cit*, p 173.

[7] The practical nature of the quarrel concerning the statehood of the Lander is illustrated in the controversy over the President's decree of July 20, 1932. That measure was taken by authority of the first and second paragraphs of art 48RV. The question to be decided by the Staatsgerichtshof was whether the President was within his rights in

side of it" is an essential element of a state, statehood has to be denied *ab initio* to the Länder, because under art 76 I RV the Reich has the competence to increase its powers at the expense of the Länder. Consequently, the rights of the Länder did not encompass the concept of sovereignty, their power was not the "*summa in cives ac subditos legibusque soluta potestas*" (Bodin) which did not tolerate any superior power

The overwhelming weight of German juristic opinion, however, adopted Laband's doctrine that a body politic, "the union of all human beings of a definite territory as a collective personality endowed with supreme power over land and people",[8] in order to be a state need not possess sovereignty in the international sense.[9]

The dominant German opinion affirmed the statehood of the Länder[10] So too the legal continuity of the Na-

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ousting the government of a state under the second paragraph, the court having held that, as Prussia had not violated her duty, the first paragraph could not be invoked to justify the President's action.

An examination of the court's decision reveals that it was torn between the unitary and federalist idea, for, while it carefully saved the symbols of statehood, it resigned the substance to the mercy of the National government Empirically considered, the decision must be regarded as denying the existence of statehood, theoretically, the decision maintains it As Heckel says, ("Das Urteil des Staatsgerichtshofs vom 25, 10, 1932 in dem Verfassungsstreit Reich-Preussen", *AöR* (1933), N F 23, p 187), such protean beings exist in the realm of fable only

Therefore, at the "alteration of the Weimar constitution" (*Verfassungswechslung*, Schmitt, Carl, *Verfassungslehre* (Munchen-Leipzig, 1928), p 99), the question had not yet been answered

[8] Meyer-Anschutz, *Lehrbuch des deutschen Staatsrechts* (München-Leipzig, 1919), p 3

[9] Anschütz, *op cit.*, pp 38-39

[10] *Ibid*, p. 38 "That body will be known as a state which has the historical antecedents, or has been created in the image of such a state, retains a large degree of autonomy, has the political organization of a state, and performs political and social functions analogous to those performed by the independent state" Emerson, *op. cit*, p 150

"The problem takes on quite a different aspect if for the general

tional Republic with the Empire and the legal continuity of the Free State of Bavaria with the Kingdom of Bavaria was accepted as true[11] by the mass of German juristic opinion [12]

2. A DUAL STAATSGEWALT. Art. 5 RV. reads. "The 'Staatsgewalt' (or sovereignty in the internal or constitutional sense, 'a will peculiar to the state and not possessed by other legal persons, a competence supreme in its sphere of ruling land and people')[13] is exercised in National affairs by the organs of the Reich, in the affairs of the Länder in accordance with the State constitutions " The Staatsgewalt exercised by Bavaria, directly by the State citizens in elections, popular initiations and referendums (pars. 6-7 VU),[14] and indirectly by the constitutional organs of the Bavarian State, i e Landtag, governmental agencies (ministers, administrative authorities, courts) and aggregations of self-government (par 3 VU.), emanated from the people "as a whole" (par 2 VU.).

question, 'Is the Land of the German Reich a State or no?', one substitutes the particular question, 'Is Bavaria a State or is it merely a somewhat autonomous and indifferent province?' To the first the answer will be theoretical and essentially fruitless, but to the second the answer may be not without weighty political consequences " *Ibid*, p 253

[11] Anschütz, *op cit.*, pp 8-11, v Jan, *op. cit*, p 16, contra, e. g, Nawiasky, *op cit*, p 66 The question of the legal continuity of the National Republic with the Empire, etc. — more contested even than that of the statehood of the Länder — is of purely theoretical nature Anschütz, *op. cit*, p. 10

[12] *Cf* par 94 VU "All laws which were in effect in Bavaria before Nov 7, 1918 retain their validity in so far as they are not in conflict with this Constitution or until they are set aside or amended by legislation as provided for in this Constitution . . "

[13] Meyer-Anschutz, *op cit*, pp 18 *et seq.*, 31.

[14] According to par 6 VU a Bavarian, after having completed his twentieth year, entered the circle of the State "citizens", i e, of those persons who participated in exercising the sovereignty emanating from the people. A state citizen had the suffrage (par 7 VU) v Jan, *op cit*, p 28.

According to Anschütz[15] there was a dual Staatsgewalt. the Staatsgewalt exercised by the National organs of government emanated from the German people, the Länder were commonwealths subordinate to the Reich,[16] but possessed of a Staatsgewalt in their own right, i. e. a Staatsgewalt which they did not receive in fee from the Reich (nor from anybody else). This original and non-delegated character elevated a German Land above the non-state [17]

[15] Pp 35 *et seq* Anschutz's "*Verfassung*" is the unrivalled standard commentary on the Weimar constitution from a bourgeois-liberal standpoint. On Anschutz's construction of Staatsgewalt see Emerson, *op. cit*, pp 78-79

[16] The subordinate relationship did not prevent the making of treaties between the Reich and the Länder (Examples treaties between the Reich and Bavaria concerning the transfer of the Bavarian railroads (March 30, 1920), posts and telegraphs (March 29/31, 1920), and certain waterways (Aug 16, 1921) These treaties and art 7 (19) RV. superseded pars 89-91 VU Constitutional law governed these treaties, Anschutz, in *HdbDStR* 1, p 298

International law governed the treaties between the Länder; Thoma in *HdbDStR* 1, p 178 (Example a treaty between Bavaria and Prussia concerning the consolidation of scattered holdings in Coburg of July 14 / Sept 15, 1922 Pincus, Ernst, *Das Vertragsschliessungsrecht der Länder* (Diss Freiburg, i/Br, (1927), p 112)

Ficker, Hans G, "Vertragliche Beziehungen zwischen Gesamtstaat und Einzelstaat im Deutschen Reich", *Abhandlungen aus dem Staats- und Verwaltungsrecht* (Breslau, 1926), Heft, 38, gives types of state treaties between a central state and a member state (p. 46) and a list of treaties concluded between the Reich and the Länder, (p. 208).

[17] Anschütz, *op. cit.*, p. 68.

3. POLITICAL REALITY WITH ITS INTERESTS, SENTIMENTS AND DYNAMIC CONCATENATIONS

a. PARTICULARISM It will greatly enrich our conception of the relationship between the Reich and Bavaria if we bear in mind the unique historic conditions under which different controversies originated. The idea of reserved rights has always been vigorously developed in Bavaria for many reasons. Cognizance must be taken of the fact that there is a common Bavarian feeling of unity that integrates all parts of the population into an active, vital unit and that there are racial, economic, religious and other special features in the molding of the attitude of the people of the State of Bavaria If one keeps in mind that the present territorial parts of Bavaria have a common history of only a century, one must realize how puissant and truly remarkable the influence of the Wittelsbach princes was on the ethos of the Bavarian people in welding the heterogeneous parts of their possessions into a unit There is for instance a greater community of sentiment between the racially alien Upper Bavarians and the residents of the Palatinate than between the racially kindred Lower Bavarians and Upper Austrians [1]

This leads us to a typically German characteristic, generally referred to as particularism, a curious fungus which grows upon the German body politic and the manifestations of which occasionally exhibit the allure of the spectacular. This vicious "ism" revealed itself in a marked degree of self-sufficiency, a more or less complete absence of political relations with the National

[1] Nawiasky, *op. cit*, pp 1-2

forces from without, and was always duly considered by German statesmen, as the memoirs of Bismarck, Hohenlohe and Bülow show.[2]

But internationally — as the art of Rembrandt casts light on selected places and leaves the rest in shade — the *chiaroscuro* of the Bavarian policy lights up German and conceals Bavarian traits; the basic tone of the anthem played in Munich is national, only the *appogiatura* is particularistic.[3]

b. THE YEARS 1919-1924. Even the Independent Socialist Kurt Eisner, the leader of the Revolution in Ba-

[2] "The separatist force dies hard in Bavaria, for it has certain material ingredients which can neither be swept away nor denied. There is an acknowledged difference in temperament between the South and the North, the South is still more agricultural, more a land of small trades and industries than the North, the peasantry and the lower middle classes form the largest proportion of the population Hence differences of political outlook and institutions, and a lack of understanding for the great masses of head-long driving workers, commercial people and industrialists, of the North The great mass of the Catholics can control their own country if it is independent, not so if the Reich assumes more power, for the Catholics are in the minority in the Reich The war roused jealousy of Prussia and the Reich, and the immediate aftermath of the Socialist revolution in a Catholic and peasant country inflamed dislike of the Reich . Hence the relationship between Bavaria and the Reich has not been a pretty one." Finer, *op. cit*, p 388 Nawiasky, Hans, *Grundprobleme der Reichsverfassung* (Berlin, 1928), pp 185 *et seq*, especially p 186.

[3] The particularist endeavors to realize the specific aims of his individual state without regard for the supreme principle of a unitary German community of culture, the federalist recognizes the National state as the superior state formation and merely gives it a federal structure. Koellreutter, Otto, "Integrationslehre und Reichsreform", *Recht und Staat* (Tubingen, 1929), vol 65, pp 19-20.

Federalism is a cement, particularism is an explosive. Accentuated particularism becomes separatism "German particularism has been seconded by foreign powers which dread a unified display of all German forces" Koellreutter, Otto, "Der Deutsche Staat als Bundesstaat und Parteienstaat", *Recht und Staat* (Tubingen, 1927), vol. 51, p 10.

Marianne, especially, lures occasionally rather brazenly, e g.: « *Dès 1911 l'unanimité semble faite contre le grand pays [la France] autrefois allié en qui les vaincus de 1866, réduits en esclavage par les accords de Versailles, avaient longtemps placé leur suprême espérance . . Toutes*

varia—a maladjusted, overemotional, bizarre, poorly integrated personality — knew how to capitalize this particularistic sentiment.[4] As long as the political composition of the Bavarian government under the Socialistic Prime Minister Hoffmann[5] (March, 1919-March, 1920) corresponded fairly harmoniously to the National Government, the antagonism between the contending forces remained concealed. The situation changed when after the Kapp Putsch a bourgeois government was formed in

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les combinaisons restent possibles, même peut-être un retour vers cette France, dont au demeurant on n'a pas encore oublié les bienfaits, et qui, tant qu'elle subsistera, conservera des chances de devenir un jour ou l'autre, contre la Prusse envahissante, l'ultime sauvegarde du particularisme bavarois » Rovère, Julien, *Revue des deux mondes* (Paris), Sept 1, 1920, p 186.

The true situation is well characterized by Cantalupo, Roberto, "Politica separatista francese in Baviera", *Politica* (Roma), March 31, 1923, p 221 «*La Baviera non ama la Francia ne odia la Prussia, ama di passione profonda, anche se talvolta romantica, la Germania, la più grande patria tedesca, e adora sè stessa* »

No constitutional change which the Hitler régime effected has made a greater impression on French public opinion than the Reichsstatthaltergesetz, e g, Rene Pinon, "La Revolution raciste et l'opinion mondiale", *Revue des deux mondes*, May 1, 1933, p 232 « *Dans le domaine politique, le trait dominant, c'est sans doute cette loi du 7 avril . . . Ce n'est pas seulement pour l'Allemagne que cette affaire est capitale, c'est aussi pour les autres nations* . »

[4] While the Socialistic Government in Bavaria advocated a federalistic policy, the Socialistic Bavarian deputies elected to the Weimar assembly fought for a unitary German Reich Westermayer, Franz Adolf, *Bayern und das Reichsratsproblem* (Tubingen, 1929), p 21

[5] A leader of the Majority Socialists He did not swagger individually like Eisner, but was a muddled collective hedonist His ministry indulged in an orgy of meretricious legislation Later the Majority Socialists — as M Herriot expressed it with regard to M Blum's party —tried to operate a *restaurant ouvrier — cuisine bourgeoise* The Majority Socialists were at once reforming and revolutionary — reforming in that the great majority of their members definitely repudiated violence and forcible measures and advocated a positive, constructive policy of social amelioration, and yet revolutionary, because, after all, they clung to their faith in a radical transformation of society

Bavaria.[6] At once the political divergence between the National Government — that either had Socialists as members or at least assumed a conciliatory attitude towards the radical Left — and the Bavarian government led to spirited clashes [7] Under the Cuno Cabinet (Nov. 22, 1922 - Aug 13, 1923), which was in close contact with the parties of the Right, this challenging issue receded into the background When the "Great Coalition" under Stresemann came into existence (Aug 13, 1923) the smoldering flames of antagonism were rekindled [8]

[6] Dr v Kahr, a state functionary, became prime minister (March, 1920 - September, 1921) The Bavarian People's Party furnished the finance minister (Dr Krausneck, who never hesitated to attack the National Finance Equalization Laws), the minister of education (Dr Matt, the father of the school provisions in the Church covenants) and the minister of social welfare (Oswald)

[7] In conjunction with the National Law for the Protection of the Republic of June 24, 1922 Piloty, Robert, "Der Streit zwischen Bayern und dem Reich uber die Republikschutzgesetze und seine Lösung", *AöR* (1922), N. F 4, Poetzsch, Fritz, "Vom Staatsleben unter der Weimarer Verfassung (vom 1, Januar, 1920 bis 31, Dezember, 1924)", *JöR* (1925), vol 13, pp. 76-91; Mattern, *op. cit*, pp 310-323, the same, *Bavaria and the Reich, the Conflict over the Law for the Protection of the Republic* (Baltimore, 1923)

The Bavarian prime minister was Graf von Lerchenfeld auf Kofering, a veteran diplomat (September, 1921 - November, 1922) Kahr had resigned on account of frictions with the National Government relative to the disarmament of the so-called Orgesch, an organized and armed private force The disbandment of the Orgesch was insisted upon by the Entente

[8] The conflict raged around the Ordinance of the National President of Sept 26, 1923 Literature Poetzsch, *JoR* (1925), vol 13, pp 91-96, Rothenbücher, Karl, "Der Streit zwischen Bayern und dem Reich um Art 48 RV und die Inpflichtnahme der 7. Division im Herbste 1923", *AöR* (1924) N. F 7, the same, "Der Fall Kahr", *Recht und Staat* (1924), vol. 29, Grau, Richard, "Der Konflikt zwischen dem Reiche und Bayern über die Frage des Uniformverbots, *AoR* (1933), N F 23, pp 114-120; Mattern, *op cit*, pp. 323-337.

The Bavarian prime minister was Dr v Knilling (November, 1922-June, 1924), who had been minister of justice in the last royal cabinet Lerchenfeld was forced out of office by the Bavarian States' righters who considered the revocation of a Bavarian ordinance which constituted a nullification of part of the National Law for the Protection of the Republic as yielding too much to the National forces.

Fittingly indeed, one may repeat William Penn's dictum "Governments, like clocks, go from the motion men give them, and as governments are made and moved by men so by them they are ruined too Wherefore governments rather depend upon men than men upon governments.'

c. IS FEDERALISM COMPATIBLE WITH THE PARLIAMENTARY REGIME? The last statement furnishes the answer to the question whether federalism is compatible with the parliamentary régime. The purpose of the federal state is not to amalgamate the two forces of political tendencies — one federal, the other unitarian — as if they were antagonistic, or to bring them outwardly together, but to be a living unity, by virtue of inward necessity — a unity in which the two fundamental tendencies are not two parts, but two forces. In a healthy federal state the individual states are not simply objects of integration, but above all things means of integration.[8]

Did the exercise of State rights through the parliamentary régime block the process of integration of the Reich? It was axiomatic in German constitutional juris-

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The foregoing conflict led to an agreement by way of compromise between the National and Bavarian Governments, published on Feb 18, 1924

In these conflicts the interpretations of the dictatorship emanating from art 48 RV and par 64 VU. did not always wear their true legal garb of independent statehood, but also masqueraded as a policy of political expediency, the political construction of the constitution was the stalking horse behind which legal premises found their explanation

How the political situation looked in 1924, is forcibly shown by a statement of Professor Rothenbücher, one of the authorities on Bavarian constitutional law. He wrote ("Der Streit, etc", *op cit*, p 84) "Realities have proved that art 48 RV is *not* enforceable in Bavaria, though Bavaria remains a component part of the Reich"

[9] Smend, Rudolf, *Verfassung und Verfassungsrecht* (München Leipzig, 1928), pp 118-119, as given by Mogi, *op cit*, pp 1094-1095 The theory of the spiritual basis of the state as the result of personal functional and material integration is the outstanding theory in Germany to-day. It is a modern growth of antagonism to juristic formalism

prudence dealing with the Bismarckian constitution to proclaim the incompatibility of a federal organization with the parliamentary régime. Hugo Preuss held this thesis, at least for the monarchical federal state, and therefore embodied in his first draft of the Weimar constitution a far-reaching decentralization and autonomous administration In contrast, Carl Schmitt[10] claims that the true cause for discord between the two institutions is rather the peculiar relation of democracy and federalism As a national democracy, as well as every federal organization, presupposes a substantive homogeneity, it is difficult, he argues, to justify the existence of a multitude of independent democratic states within a nationally homogenous unity In spite of all theoretical apprehensions as to a satisfactory joint functioning of the two institutions, the fact remains that federalism and parliamentarism coexisted for fourteen years. Thus a harmony between federalism and parliamentarism seems to be proved *ipso facto*. In reality, however, a harmony was brought about only by the representation in the Reichstag and in coalition cabinets of parties advocating the federal principle.[11] On the other hand, diverse socially powerful associations, forming a pluralistic German state and controlling organizations extending throughout the Reich, were interested in the defense of their effective positions in the different Länder. Federalism was used as a bulwark against an opposition party or coalition ruling in the Reich and in other Länder. In this manner the

[10] *Verfassungslehre* (Munchen-Leipzig, 1928), pp 388-390.

[11] The Bavarian People's Party, the foremost champion of the federal idea, participated frequently in these governmental combinations. *Cf.* Rogers-Foerster-Schwarz, "Aspects of German Political Institutions, I President And Cabinet", *Pol Sci Quar.* (Sept., 1932), vol. xlvii no. 3, pp 339-344

federal organization became the ally and prop of pluralism. "But the 'compatibility' of parliamentarism and federalism, thus artificially established, was gained only at the expense of a dual scarification (*Auflockerung*) of the compactness and firmness of the Reich's unity."[12]

d. THE BAVARIAN GOVERNMENT MEMORIALS OF 1924 and 1926. Dr. Heinrich Held, a publisher and leader of the Bavarian People's Party, a skilled organizer and ready debater, the Bavarian constitutional statesman *par excellence*, succeeded in June, 1924, after the new Landtag elections, in forming a new ministry (in which the German Nationalists and the Farmers' Party participated).

1924 was the critical year when the new Bavarian democracy had lifted itself out of the slough of utter collapse by a mighty effort of will. Bavarian democracy accepted the bitter consequences of foreign invasion of the Reich, entailing a completely bankrupt currency, and began to reset its economic, religious and constitutional life in grooves which the past had dug.

The Bavarian People's Party was the broker of the federalistic idea. Dr Held became the chief exponent of the doctrine of Bavaria's State rights. He considered the Lander to be states endowed with rights which guarantee this character, — rights which they possess on the basis of an original, not derivative competence. For democratic Bavaria the federalistic element was the solar plexus of the National constitution.

Bavaria's wishes concerning the safeguarding of her independent statehood are expressed in two memoranda offered to the Reichsrat in 1924 and 1926 by the Ba-

[12] Schmitt, Carl, *Der Hüter der Verfassung* (Tübingen, 1931), pp. 94-95

varian Government[13] The memorial of 1924, "For the Revision of the Weimar constitution", contains these postulates

1 The competence between the Reich and its component States must be defined anew All matters, not unquestionably common affairs, must be given back to the member States The full range of their statehood is to be restored to them, in so far as they insist thereon

2 The influence of the member States on the conduct of common affairs must be strengthened Far-reaching participation in the formation of the Reich's will must be granted to them

In the spring of 1926 Bavaria renewed her demand to live as a "State" within the framework of the German Empire and objected to the policy of the National Government, designedly directed towards an undermining (*Aushohlen*) of the statehood of the component States, thereby jeopardizing their very existence to which they had an historic right and which was guaranteed to them by the National constitution.

e THE *LANDERKONFERENZEN.* A reconciliation of the contending principles of Federalism and Unitarism[14]

[13] Poetzsch, *JoR* (1925), vol 13, p 100, n 2, Poetzsch-Heffter, *JöR* (1929), vol 17, pp 61-62, v Jan, *JöR* (1927), vol. 15, pp. 10-11, Finer, *op. cit*, pp 387-388

Heinrich Triepel, "Der Foderalismus und die Revision der Weimarer Reichsverfassung", *Zeitschrift für Politik* (Berlin, 1925), vol 14, pp. 201-203, judged the Bavarian manifesto to be an appeal to revise the Weimar constitution in a way that would go back to the state of things that existed, not before 1919, but before 1867 In his opinion it was impossible, nay unnatural, to attempt to undo the unification which the Weimar constitution had brought about in matters which had long been regarded as desirable *Cf* Mogi, *op cit*, p. 933.

[14] The problem of the Länder is no grave problem of administrative expense All the parliaments in the Reich and Lander cost the German people in 1925 RM 14,2m of which the Reichstag absorbed RM 5, 7m The Bavarian Landtag cost in 1925 RM 1,1m The "luxury of statehood" cost Bavaria 2,49% of the total expenditures Schulze, Alfred, *Das neue Deutsche Reich* (Dresden, 1927), pp 164, 190-191.

Contrary to general belief these figures are of Lilliputian size in comparison to the enormous total public expenditures Should Germany be transformed into a unitary state, it is true that the ministers and some of their staff could be eliminated, but they would be replaced by expensive National functionaries.

seemed possible only through compromise, on which "every human benefit and enjoyment, every virtue and prudent act" (Burke) is founded. In order to effect a reintegration, "an excellence of composition", between the diversity of members and interests, often individually selfish and hostile, several conferences of the Lander were called.

Prime Minister Held fought for the federalistic doctrine during the States' conferences in daily skirmishes and, occasionally, in major field battles. In October, 1928 he submitted to the Reichsrat "Materials for the Revision of the Constitution" Dr. Held argued therein that the National Constitution lacked clarity and firmness, indispensable for its proper functioning, and that, even where the boundaries between the Reich and Lander were erected with certitude, the frontier poles were surreptiously moved in favor of the Reich He further contended that the constitutional relations between the National Government and Bavaria were based on warfare instead of law, and named as the chief task of the two governments the stabilization of the National Constitution, to which end he framed specific postulates In 1930 Dr. Held clarified the Bavarian standpoint with regard to the elimination of the diarchy between the Reich and Prussia. The only solution which was acceptable to him was one that put into execution the program of the

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At any rate, "a genuinely instinctive expression of kinship with a chosen group is deliberately exclusive in temper, and because it is exclusive, it seeks autonomy, even if autonomy involves economic sacrifice" Laski, Harold J, *A Grammar of Politics* (New Haven, 1929), p 221

decentralization of Prussia as prescribed in her constitution [15]

During all the discussions of the *Länderkonferenzen*[16] the Bavarian Prime Minister posited as axiomatic the following division of competences between Bavaria and the Reich: "To the Reich — everything that is imperative for the prosperous development of the entire Commonwealth and for its effectiveness in its foreign affairs; to the Länder — everything else "[17]

f. THE RELATIONS OF THE BAVARIAN GOVERNMENT TO THE BRUNING CABINET. During Dr.

[15] v Jan, *JoR* (1931), vol 19, pp 7-8

For the extensive literature on the subject see Koellreutter in *HdbDStR* 1, p 146, n 34, also, e g, Becker, Walter, "Föderalistische Tendenzen im deutschen Staatsleben seit dem Umsturze der Bismarckschen Verfassung", *Abhandlungen aus dem Staats- und Verwaltungsleben* (Breslau, 1928), par 21, "Die Reichskonferenz im Januar, 1928, pp 173 *et seq*; Medicus, Franz Albrecht, *Reichsreform und Länderkonferenz* (Berlin, 1930), Nawiasky, Hans, *Grundprobleme der Reichsverfassung* (Berlin, 1928), pp. 132 *et seq*, the review "*Reich und Länder* (since 1927), edited by Adametz, Conrad and Raab In English literature see Mogi, *op cit*, pp 961 *et seq*

[16] Events proved these conferences to be "sequestered vales of illusion."

"If Bavarians opposed the German Republic and the Weimar constitution and appealed to the Empire and the Bismarckian constitution, they counted on the shortness of public memory For despite reserved rights and federal guarantees the incomplete National unity under the Empire went too far for Bavarian particularism One fought then against Prussian militarism in the same way and with the same undercurrent of anti-Semitism as one does to-day against the Marxians of Berlin" Mogi, *op cit*., p 897, quoting Hugo Preuss, *Um die Reichsverfassung von Weimar* (Berlin, 1924), p 47

[17] In juristic literature the case of Bavarian federalism is championed by two Bavarian law professors, Konrad Beyerle, a member of the Center party in the National Assembly (*Foderalismus* (Paderborn, 1923), *Foderalistische Reichspolitik* (Munchen, 1924)) and, temperately, by Hans Nawiasky (*Der Bundesstaat als Rechtsbegriff* (Tübingen, 1920) and his other works cited *passim*)

On Beyerle see Mogi, *op cit*, pp 955-956, on Nawiasky's theory of divided sovereignty, adopted from the old Waitz theory, *ibid*, pp 944 *et seq*, and Emerson, *op cit*, pp 251-252 Nawiasky's federalistic doctrine is criticized, e. g, by Thoma in *HdbDStR* 1, p 172 n.

Brüning's chancellorship (March, 1930 - May, 1932) the tension in National-Bavarian relations was relaxed, as Catholic policies of the Reich and the Land were in harmony. The Bavarian Government tacitly consented to a liberal exercise of the National dictatorial power of art 48 RV. The common National and Bavarian opposition to National Socialism did not permit serious disharmonies to come to the fore. With superlative optimism the Bavarian Government assumed that the "apocalyptic ride of the dictator" (Nawiasky) would not affect its prerogatives. In *Hodr* blindness it complacently considered a dictatorship as a matter of expediency.

Every time the President of the Reich wielded his dictatorial power, a temporary suspension of the normal coordinative federal mechanism, a provisional supremacy of the National will over the Federal balance of power as decreed by the Weimar constitution was the inevitable consequence. After the elimination of the Reichstag in July, 1930, the National President became in almost all relations the deciding factor in National politics This change in the position of the President of the Reich also led to an incursion of the National dictatorial power into the federal structure Despite a convulsive, agitated, "permanent" governance on the basis of art 48, the Reich, however, succeeded in conciliating the Länder.

Only in financial matters did controversies arise between the Reich and Bavaria in respect to certain provisions of the emergency ordinance of the President of June 26, 1930, but here also the convenient elasticity of a "governance on the basis of art 48" allowed the possibility of clearing away, *sub rosa,* prevailing divergences The emergency ordinance of Dec. 1, 1930 em-

bodied those alterations of the former ordinance which were conceded to Bavaria by way of compromise.[18]

g. THE RELATIONS OF THE BAVARIAN GOVERNMENT TO THE v PAPEN GOVERNMENT. Federal amenities were brushed aside with the coming into office of the v Papen Government of June, 1932. The particularistic truculence of the Bavarian Catholic bourgeoisie, acerbated by Dr Brüning's forced abdication, did not blend successfully with the bold designs and authoritarian social views of the Prussian-Conservative Lt.-Col von Papen and his Cabinet of "barons". The National Government abandoned its opposition to National Socialism, and therefore the alliance with the Bavarian People's Party was sundered. When the Reich, by presidential decree of June 14, 1932, permitted the wearing of uniforms on the part of political parties, Bavaria tartly stigmatized the measure as an infringement of her police power and promulgated her own ordinance of June 17, 1932, incorporating the Bavarian ordinance into her Police Penal Code.[19] Nor did Bavaria hesitate to accuse the v. Papen régime of headlong assertions of arbitrary power in ousting the Prussian government. In order to safeguard the prerogatives of the Lander, she joined Prussia and Baden in disputing the constitutionality of the President's decree before the Staatsgerichtshof [20]

The Bavarian Government was discreet enough not to defy, Ajax-like, the lightning of the Trojans and to avoid

[18] Grau, Richard, "Der Konflikt zwischen dem Reiche und Bayern über die Frage des Uniformverbots", *AöR* (1933), vol 23, pp 99-100.

[19] *Ibid*, pp 101-102.

[20] *Cf "Preussen contra Reich vor dem Staatsgerichtshof"* (Berlin, 1933) Bavaria was represented before the Court by State Councillor v Jan, Professor Nawiasky and Privatdozent Dr Maunz

provoking the National President to extreme measures.[21] But the dominance of the Reich's will over the will of the Länder had become supreme.[22]

h. BAVARIA CAPITULATES BEFORE THE NATIONAL SOCIALISTIC TOTALITARIAN STATE. The most amazing surprise in the dazzling success of Hitlerism was provided by the collapse of all opposition in Bavaria where a member of the government, only a fortnight before the elections, had proudly proclaimed that any National Commissioner appointed for Bavaria would be arrested on the Bavarian frontier. Here spoke the traditional Bavarian antagonism to Prussia, the Bavarians' jealousy for their semi-independence.

The Bavarian Government did not understand the sentiments of its own constituency. In the Reichstag election of March 5, 1933 the Brown Shirts polled as many votes as the Catholic Bavarian People's Party and the Social Democrats together. For no German Land did the electoral results bring about such a transfiguration of all political realities as for Bavaria; they constituted a catastrophe for a party which had ruled Bavaria for several decades and whose leaders, Prime Minister Dr. Held and State Councillor Fritz Schaeffer, their vision dimmed by a rare political astigmatism, believed before the election that they had the support of the majority of the Bavarian people in their resistance to the National régime of v. Papen-Hitler. On the basis of the

[21] Bavaria's refusal to abrogate her ordinance in the matter of uniforms for political parties was countered by the Reich by the ordinance of the President of June 28, 1932 in which general injunction orders of the States were peremptorily set aside, but a concession was granted to the States in so far that in specific instances, foreboding an imminent danger for the public weal, the issuance of an injunction to wear party uniforms was permitted

[22] Grau, *op cit*, pp 105-106

Reichstag election, the Bavarian Landtag would have taken on the following political composition:[23]

Government Parties:		*Opposition Parties:*	
National Socialists	58	Bavarian People's Party	40
German Nationals	5	Socialists	18
Farmers' Party	2		58
	65	Communists (disfranchised)	5
			63

With dramatic swiftness the Hitler government capitalized its success Bavaria was forced to yield to National demands on March 9, 1933. Dr. Held was presented with an ultimatum demanding the immediate appointment of a new Bavarian Cabinet which should represent the Nazi majority won in the election. While he was considering with the Cabinet how it should be answered, the Ministerial building was cleared by Nazi storm troops, and it was announced that General Franz Ritter von Epp, Nazi deputy in the Reichstag, had been appointed National Commissioner for Bavaria by the Hitler Cabinet.[24] Not even a show of resistance was offered; Bavaria capitulated peacefully. The unquestioned supremacy of the Federal government over the States was now definitely established.[25]

[23] *Bergisch-Märkische Zeitung*, March 6, 1933; *Frankfurter Zeitung*, March 11, 1933

[24] General von Epp, who had won the highest German decoration during the World War and had afterwards taken a leading part in the suppression of the Bolshevist régime in Munich, formerly belonged to the Bavarian People's Party and was the candidate of that party for the State presidency of Bavaria. He joined the National Socialists in 1928.

A graphic story of the conquest of Bavaria by the Nazi storm troops appeared in the Vienna *Reichspost* on March 15, 1933.

[25] Meyer, K., "Brief aus Bayern", *DJZ.*, May 15, 1933, p. 672.

§4 *Bavaria as a Democracy*

1. "BAVARIA IS A FREE STATE. SOVEREIGNTY EMANATES FROM THE PEOPLE" The Bamberg constitution was the fulfilment of two ideas solemnly expressed in symbols, when in pars. 1 and 2 it commenced with the words: "Bavaria is a Free State. Sovereignty emanates from the People" These two paragraphs, norms of a very definite legal meaning, proclaimed what the subsequent paragraphs organized into a reality: Democracy and with it Sovereignty of the People. The Bavarian democracy had a preponderantly bourgeois-liberal stamp and postulated equality of rights as the constitutional basis of the State's life. It made only a few concessions to radicalism by introducing the people's initiative and referendum [1]

A separation of governmental powers was declined, because the Democrats, guiding themselves by the logic of historical developments, believed a parliamentary government to be the panacea that would cure the political disadvantages (true or fancied) of the old system It would have been more than unnatural if Democracy Triumphant suddenly had dropped its old postulates of a monistic union of powers [2] From the viewpoint of a bourgeois-liberal order the parliamentary system was admirable indeed. By blending elements of various political philosophies and balancing one element against the other, parliamentary government perfected that part of the modern constitution which was dedicated to the rule of law.[3]

[1] *Cf* Thoma in *HdbDStR* 1, pp. 186, 192.

[2] Lukas, Josef, *Die organisatorischen Grundgedanken der neuen Reichsverfassung* (Tubingen, 1920), p. 25.

[3] Schmitt, Carl, *Verfassungslehre,* pp 305-306.

Hope was also nurtured that the parliamentary system would attract, school and sift talented political leaders who in the hotbed of party and parliament would ripen into responsible statesmen [4] But no governmental system can produce geniuses to order, "the charisma of the great statesman cannot be taught "[5] In the Reich, parliamentarism was not representative of political unity. In the Lander, parliamentarism was no means of national integration A parliament consisting of party functionaries cannot bring forward true political leadership.[6]

The new constitutional order was legitimized by a rich catalog of fundamental rights that were intended to form a protective armor about the Bavarian democracy. The fundamental rights belong to the democratic institutions of the German *Rechtsstaat*, which may be defined as the "maximum possible legality in administration" (Finer) or as *"une superlégalité constitutionnelle"* (Hauriou).[7]

2. FUNDAMENTAL RIGHTS. The reception into the German (arts. 109 *et seq*) and Bavarian (pars 13-16)

[4] *Ibid.*, p. 314, Thoma in *HdbDStR* 1, p. 196.

[5] Grabowsky, Adolf, *Politik* (Berlin-Wien, 1932), p. 21, Nawiasky, Hans, "Die Stellung der Regierung im modernen Staat", *Recht und Staat* (1925), vol 37, p 20, Schmidt, Richard, "Das Fuhrerproblem in der modernen Demokratie", *Probleme der Demokratie* (Berlin-Grunewald, 1931), Heft, 10, p 4

[6] Schmitt, Carl, *Verfassungslehre*, p 314; Koellreutter, Otto, "Integrationslehre und Reichsreform", *Recht und Staat* (Tübingen, 1929), vol. 65, pp 18-19

"The English political system breeds political leaders, the German system only arrivistes " Dibelius, Wilhelm, *England*, (Stuttgart, 1923), vol II, p 218.

Cf. Barthélemy, Joseph, *Le Problème de la compétence dans la démocratie* (Paris, 1918), p 170, Finer, *op. cit.*, pp. 1068 *et seq*, pp 1083 *et seq.*, Preuss, Hugo, *Das deutsche Volk und die Politik* (Jena, 1915)

[7] Friedrich Julius Stahl's and Lorenz von Stein's classic definitions of "Rechtsstaat" are given by Emerson, *op. cit.*, p 35, n. 64 and p. 39.

constitutions of norms relating to certain fundamental rights of the individual as a human being and citizen, a declaration of solidarity with the ideas of the modern world, a people's catechism of sociology, is no peculiarity, but rather a typical characteristic of every modern constitution This universal constitutional usage rests on the concept that a well-ordered and comprehensive constitution must not only regulate the organization of the state, but must also erect barriers between the state and the individual as well as limit the state's power over the citizen's liberty [8] To this end the constitution must contain a special chapter in which that liberty in its various activities is constitutionally patented through an assurance of fundamental rights

The framers of the Bamberg constitution also were "in search of a Dulcinea, most beautiful of women under the name of Liberty, the Rights of Men and Citizen, and Humanity" (v Holst) They cancelled, however, the majority of their drafted prescriptions pertaining to fundamental rights, when they became acquainted with the National constitution, and intended to let stand only those deemed necessary within the framework of the still permissible State legislation [9]

The significance of these four paragraphs of the Bamberg constitution was that they formed the substantive basis for the decisions of the Bavarian Staatsgerichtshof in constitutional complaints (*Verfassungsbeschwerden*)

[8] Schmitt in *HdbDStR* II, p 591, Thoma, *ibid*, p 619
A Bavarian State citizen had the following *duties*. to obey the laws and execute governmental orders, to pay taxes, to assume certain honorary offices (e g, to do jury duty), to testify in court, to give notice to the authorities of felonies endangering the community of which he might have knowledge (par. 139 of the Penal Code), and to perform certain communal duties (e g, to serve in the fire brigade)

[9] v. Jan, *op cit*, p 44

under par. 93 VU [10] These paragraphs, in so far as they repeated the National prescriptions concerning fundamental rights, permitted the Bavarian Staatsgerichtshof to import National prescriptions and to pass upon alleged infringements of the National constitution.[11]

Par 13 VU had a substantive significance, for Bavarian citizens were not allowed to be deported from Bavaria. Restrictions as to the sojourn of other German citizens in Bavaria, or their deportation from Bavaria, were permitted by par 3 II of the Statute of Nov. 1, 1867 regulating the right of travel and residence, sojourn and settlement (*Freizugigkeitsgesetz*), on the basis of art. 111 RV Art. 110 RV was not operative in favor of other German citizens, as the *lex specialis* of art. 111 (3) preceded.[12]

Par 15 III VU prohibited the conferring of titles which did not designate an office, profession or academic degree, its phraseology was not as rigorous as that of art 109 IV VU. The Bavarian government interpreted the word "titles" in art 109 IV RV. to mean "honorary titles" and liberally bestowed honorary titles connoting an office or a profession on state functionaries or private persons, or conferred titles which functionaries were permitted to use in addition to their official designation (e g. on university professors the title of "*Geheimer Rat, Geheimer Regierungsrat, Geheimer Justizrat*", etc.). The National Minister of the Interior contested the legality of the Bavarian practice as contrary to art. 109 IV RV, and, under art. 15 III or art. 19 I RV., brought

[10] *Cf*, §21, *infra*.

[11] Hensel in *HdbDStR* ii, p. 321, n. 19, Schmitt, *ibid.*, p 574; contra Wenzel in *HdbStR* i, p 617, n. 55; v. Jan, *op cit.*, p. 173. The Staatsgerichtshof followed Hensel and Schmitt.

[12] v. Jan, *op cit*, pp 44-45.

suit before the National Staatsgerichtshof demanding the abrogation of the Bavarian practice. The Staatsgerichtshof, in its decision of Dec 9, 1929, upheld the National Minister of the Interior.[13]

Par 16 VU. enabled the Landtag in 1927 to vest a general police power (relating to the maintenance of public safety, peace and order) in the Bavarian police.[14]

§5 *Bavaria as an International Person*

1. THE PRINCIPLE OF A UNITARY FEDERAL ADMINISTRATION OF FOREIGN AFFAIRS. Ranke coined the phrase "the primacy of foreign affairs". It was with deep understanding that Locke coordinated the legislative with the foreign — or as he called it — federative prerogative of a state A state is power, and power presupposes liberty of action on the front line and cohesion in the rear. The administration of foreign affairs differs fundamentally from other administrative activities of the state, and in a federal state requires a nicely balanced distribution of competences. It is, therefore, not surprising if we find a basic change in the Weimar constitution from the guiding principles of the Bismarckian constitution, induced by the development of inter-state relations, dating back to previous decades, and impelled by the war, collapse of Germany, and after-war developments.[1]

[13] Lammers-Simons, *Die Rechtsprechung des Staatsgerichtshofs für das Deutsche Reich und des Reichsgerichts auf Grund Artikel 13 Absatz 2 der Reichsverfassung* (Berlin, 1929), vol II, pp 25 *et seq*, especially pp 27, 40

[14] v Jan, *op cit*, p 49, Rothenbucher, Karl, "Über einen Fall der Präventivpolizei und die Theaterzensur", *Festgabe für Fritz Fleiner* (Tubingen, 1927), pp. 211 *et seq.*, denies the constitutionality of such a blanket police power.

[1] Fleischmann in *HdbDStR* I, p 209

The fundamental principle of a unitary administration of foreign affairs which could be effected in Bismarck's Reich in practice only was raised to the dignity of constitutional provisions in the Weimar constitution. Legislation as well as administration which affected relations with foreign states was declared to be the exclusive prerogative of the Reich Art. 78 I RV deprived the Lander of the right to send and receive representatives [2]

[2] After the cessation of hostilities France was the only power which maintained direct diplomatic relations with a member State of the Reich, — Bavaria This baffling occurrence in the political life of the German Republic has antecedents mocking every international usage

An envoy extraordinary and minister plenipotentiary presented himself in Munich in 1920 in order "to cultivate the relations that existed between Bavaria and France" (Thilo, Ulrich, *Probleme der staats — und völkerrechtlichen Stellung Bayerns* (Berlin, 1930, Kiel Universitat, Institut fur internationales Recht, Heft 14), p 17). Contrary to all rules of international courtesy an *agréation* had not been requested for this envoy The Bavarian Prime Minister, reluctant to accentuate the existing tension between the Reich and France, could not do otherwise but gracefully accept the French *lettres de créance.* The Bavarian government, however, peremptorily declared that it would refrain from appointing a Bavarian envoy to Paris and would also otherwise strictly adhere to the provisions of the National constitution

(Stoke, Harold Walter, *The Foreign Relations of the Federal State* (Baltimore, 1931) misjudges a cardinal point in Bavarian policy when he writes (p 210) that Bavaria received the ambassador from France as a manifestation of her independence and because she resented more strongly than the other States the "encroachments" of the Reich).

The French government defended its position by invoking the treaty of Versailles. The German Foreign Minister protested, basing his objections on the Weimar constitution The French ambassador, in reply, stressed the view of his government that the stipulations of Versailles were superior to the provisions of the Weimar constitution and quoted the preamble of the treaty of Versailles « *A dater de la mise en vigueur du présent traité les relations officielles des puissances alliées et associees avec l'Allemagne et* l'un ou l'autre des Etats allemands *seront reprises* » Italics mine

(The English text, the other official text, deviates from the French text, as it speaks of *any* of the German States According to the French text only those states which up to 1914 maintained foreign relations with the Allies can be affected)

The Allied and Associated powers had once again an opportunity to revert to the concluding sentence of the preamble before the acceptance of the treaty of Versailles, and if they so desired, to elucidate it. The

2. THE INTERNATIONAL TREATY-MAKING POWER OF BAVARIA. The legal capacity or status (*Rechtsfähigkeit*; *capacité juridique*) to have rights and duties presents itself under the bifurcated aspect of contractual or treaty-making power, or capacity of action (*Geschäftsfahigkeit*; *la capacité de s'obliger et de créer par le moyen de déclarations de volonté des situations juridiques actives et passives — contrats —*) and delictual capacity, or responsibility for delinquency (*Deliktsfahigkeit*;[3] *la capacité d'ester en justice ou d'être défendeur dans un procès international, la capacité de s'engager par la voie de délits*) [4] Whereas a state is or is not a subject of international law — there is no *tertium quid* — the treaty-making power of a state can be circumscribed in ratio to its dependence on another state Treaty-making power presupposes international personality; but a state that possesses international per-

German delegation, in its reply to the peace conditions, made the following statement "The preamble speaks of the resumption of the official relations of the Allied and Associated powers with both Germany and one or the other German States The question whether and to what extent the individual member States will have the right of sending and receiving foreign representatives will find its solution in the new German constitution The German delegation asserts that the peace treaty cannot anticipate such a solution" (Thilo, *loc cit*, pp 35-36)

The answer of the Allied and Associated powers to this question of the resumption of diplomatic relations with the German member States was pregnant with omission

As none of the other powers followed the French example (— the installation of the French diplomatic agency was declared illegal, particularly by English opinion —, *Frankfurter Zeitung*, July 25, 1920, quoting the *Manchester Guardian*), it can be cogently argued that France defended a one-sided doctrine Unquestionably, the treaty of Versailles gave no prerogative to France unilaterally to force demands on Germany, capriciously exceeding the collective will of the Allied and Associated powers

[3] *Geschaftsfähigkeit* plus *Deliktsfähigkeit* are designated as *Handlungsfahigkeit*

[4] Strupp, Karl, *Theorie und Praxis des Volkerrechts*, in French translation, *Eléments du droit international public* (Paris, 1930), p. 40.

sonality may well be represented by the state set over and above it It possesses only a restricted treaty-making power. in certain cases the superimposed state acts for it, in others it can acquire rights and enter into obligations independently.[5]

The contractual competence of the Länder was constitutionally regulated by art. 78 II RV . "The Länder may conclude treaties with foreign states in respect to matters the regulation of which falls within their legislative power."[6] However, because of the constitutional limitations, treaties which the Länder were competent to conclude covered merely subjects of minor importance, e g..[7] frontier questions (joint improvement of contiguous land, police and traffic, lakes and coffer-dams partly situated in one land), school questions, etc.[8]

The ambit of the treaty-making power of the Länder included those treaties that were entered into before the birth of the Weimar constitution, as their continued enforcement was not abrogated by art 178 I RV.[9]

[5] v Liszt-Fleischmann, *Das Völkerrecht* (Berlin, 1925), p. 95.

[6] Besides this general provision there was a special regulation embodied in art 88 RV. relative to postal and telegraph contracts which treated the commerce with foreign countries. those contracts were exclusively entered into by the Reich

Subjects over which the right of legislation remained with the Lander until the Reich exercised its right of legislation, *i e.*, the field of concurrent legislation, were included Anschutz, *op. cit.*, p 363, Nawiasky, *op cit.*, pp. 119 *et seq*, *contra* Hatschek, Julius, *Deutsches und preussisches Staatsrecht* (Berlin, 1923), vol II, pp. 441 *et seq.*

[7] Anschütz, *op cit.*, p. 363, Fleischhann in *HdbDStR* I, p. 213

[8] A somewhat similar power is conferred on the cantons by art. 9 of the Swiss constitution in respect to the subjects therein specified. Limited as the extent is to which the cantons may cultivate foreign relations, they are, *pro tanto*, still subjects of international law. Fleiner, Fritz, *Schweizerisches Bundesstaatsrecht* (Tübingen, 1923), pp 729-730, Schwarzenbach, Walter, *Staatsverträge der Kantone mit dem Ausland* (Diss. Zürich, 1926).

[9] Fleischmann in *HdbDStR* I, pp 214-215, cites the following examples A treaty between Bavaria and the Netherlands, also one be-

3. THE CONSENT OF THE REICH TO INTERNATIONAL TREATIES OF THE LANDER. The Weimar constitution, in contrast to the Bismarckian constitution, required the confirmation by the Reich of treaties entered into by the Länder with foreign states (art. 78 II (2) RV.) The phraseology employed[10] indicated that the assent might precede or follow the conclusion of the treaty.[11] The validity of a treaty was predicated on the assent of the Reich.[12] The assent of the Reich was granted to the Land in question by the National minister[13] to whose department the subject-matter covered by the agreement belonged.[14]

4. INTERNATIONAL RESPONSIBILITY FOR DELINQUENCIES OF BAVARIA. The contractual capacity of the Länder to express their will in international agreements is evidence that to some degree they were internationally responsible for their delinquencies.[15]

An injured state has the right to use due and proper means to obtain redress for wrongs done to it. If the remedy is to be effective, the foreign state might be

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tween Bavaria and Switzerland regulating the salmon fishery on the Rhine, a bankruptcy covenant between Bavaria and Switzerland of 1834, numerous treaties with Austria, reflecting the intimate connections extending over centuries, *e g*, in respect to Lake Constance, renationalization, compulsory school attendance (1920), the right of pursuit, etc.

[10] "*Zustimmung*" In German legal terminology the preceding assent is called *Einwilligung*, the subsequent one, *Genehmigung*. *Zustimmung* is the generic term

[11] Anschutz, *op cit*, p 363.

[12] Fleischmann in *HdbDStR* I, p. 216. Negotiations might be carried on directly.

[13] Anschutz, *op. cit*, p 364, Kraus in *HdbDStR* II, p. 343.

[14] Art 78 RV did not speak of the cancellation of treaties. On the basis of general juristic principles such a right was accorded to the Länder *ipso iure* The right of cancellation is inherent in the idea of contractual capacity.

[15] v. Liszt-Fleischmann, *op. cit.*, p 280.

forced to have recourse to procedures, peaceful or forcible, in the manner prescribed by the law of nations, — and such measures drew the Reich into the conflict On the other hand, a member State, in case it was the injured party, could not act independently of its superimposed National State. therefore, the Reich was entitled, and also obligated, to represent the interests of its member states internationally, even in relation to treaties between foreign states and a Land covering a subject left to its exclusive competence.

Several international incidents occurred in Bavaria after the war which involved the enforcement of the rights of aliens. When the French occupied the Ruhr in 1923, Bavarian resentment took the form of expulsion of French citizens from Munich. Bavaria formally notified the National Government that she was unable to protect the French citizens in Munich against violence and disclaimed all responsibility for resulting injuries. Berlin notified the French government that, since Bavaria could not protect French citizens within her borders, the National Government could not assume responsibility for their protection This argument was not recognized as valid by France. In the same year, Bavaria discriminated against foreigners by subjecting them to a special hotel tax "These instances show that the German States actually exercise[d] considerable authority in determining the legal position of aliens "[16]

5. BAVARIA AND THE ROMAN CURIA. The relation of Bavaria to the Roman Curia was regulated in the concordat of March 29, 1924. This concordat, the concordat between Prussia and the Holy See of June 14, 1929, as well as the covenants with the Evangelical Churches

[16] Stoke, *op cit*, pp. 159-160.

have led to an exhaustive study in German literature concerning the legal nature of agreements with the Church [17]

The Bavarian Government, with doubtful justification,[18] designated the concordat as a "State" treaty in the sense of par. 50 VU, i. e. as a treaty with a foreign state governed by international law On the other hand, the covenants with the Protestant Churches[19] were characterized as "Administrative Contracts of the Government"[20]

In concluding these agreements, the Bavarian Government used the forms proper to its juristic interpretation of the nature of each. The concordat, as a state treaty, was signed by three ministers; the Protestant covenants were signed by the Minister of Education alone [21] As a state treaty, the concordat required the

[17] E g, Huber, E R, "Verträge zwischen Staat und Kirche im Deutschen Reich", *Abhandlungen aus dem Staats- und Verwaltungsrecht* (Breslau, 1930), Heft 44, Liermann, Hans, "Das evangelische Konkordat", *AöR* (1927), N F 13, and "Staat und Kirche in den Lateranvertragen zwischen dem heiligen Stuhl und Italien vom 11, Februar, 1922", *AoR* (1930), N F 18, Oeschey, Rudolf, "Die Rechtsgrundlagen der bayerischen Kirchenverträge", *Bayerische Verwaltungsblätter* (1926, 74, Jahrgang), Rothenbücher, Karl, "Die bayerischen Konkordate von 1924", *AoR* (1925), N F [illegible]oen, Paul, "Die Rechtsgrundlagen der Verträge zwischen Staat und Kirche und die Vertrage der Kirchen unter einander", *AöR* (1932), N F 21.

[18] *Cf* Rothenbucher's trenchant criticism, *loc cit.*, p 300

[19] Prime Minister Dr Held declared in the Landtag (*Verhandlungen des Bayerischen Landtags, Stenographische Berichte,* 1924/1925 1, p 808) that the Bavarian State obligated itself to keep these "Administrative Contracts" in good faith, just as the concordat with the Holy See *Cf* §25 (6), *infra*

[20] The term was probably borrowed from the nomenclature of International Law In International Law this term covers agreements relating to administrative affairs in the spheres of economic and social international intercourse Schoen, *loc cit*, p 349.

[21] Huber, *loc cit*, p 100

assent of the Landtag, in conformity with par. 50 VU.[22] The Landtag's approval was given in section 1 of the Implementing Act of Jan. 15, 1925 (*Mantelgesetz*).[23] Nothing was said in this section relative to the Protestant covenants.[24] The answer to the question of the correctness or incorrectness of the Bavarian Government's interpretation depends on the theory one holds concerning covenants with Churches.[25]

[22] An internal matter between two organs of the State. *Ibid.*, pp. 104, 106, n 33

[23] "A The Landtag of the Republic of Bavaria has passed the following statute I The Concordat with the Holy See of March 29, 1924 (Supplement 1) is approved as a state treaty."

[24] As the Church covenants contained legal norms or material law (Thoma in *HdbDStR* II, pp 124 *et seq*), they were only enforceable against the State's citizens provided their content was clothed in a statute (par 74 VU.), irrespective of the validity of the covenants between the contracting parties The statute was passed as section 2 of the Implementing Act of Jan 15, 1925. Huber, *loc. cit*, p. 104.

[25] The dominant theory is the CONTRACT THEORY. It declines both a subordination of the State to the Church (*Privilegientheorie, la doctrine du Concordat privilège de l'Eglise* — now abandoned), and the superiority of the State to the Church (*Legaltheorie; la doctrine du Concordat privilège de l'Etat*, a theory which is held by few authorities. Anschutz, "Die bayerischen Kirchenverträge", *Allgemeine deutsche Lehrerzeitung*, Feb 27, 1925, is one of its adherents)

The CONTRACT THEORY proceeds from a basis of coordination between State and Church. Accordingly, both powers are independent of each other, *utraque potestas in suo genere est maxima*. Concordats are bilateral contracts, binding State and Church. Authorities, however, differ widely as to what law is applicable. It may be International Law, and then a distinction is drawn between the secular sovereign and the *pontifex maximus* (*ius inter potestates*); quasi-International Law; Coordinated Ecclesiastical-Constitutional Law; or the concordats may be designated as *pacta sui generis* *Cf* Schoen, *loc. cit.*, pp. 319-346.

The doctrine of Coordinated Ecclesiastical-Constitutional Law, adopted by Schoen and developed by him with great sagacity, treats covenants with the Catholic Church and the Protestant Churches *pari passu*

We say with L. Oppenheim, *International Law* (London, 1912), vol I, pp. 160-161 "It must be maintained . . that by custom, by tacit consent of the members of the Family of Nations, the Holy See has a quasi-international position . . . The so-called Concordats . are not international treaties, although analogous treatment is usually

A spirited controversy arose whether a concordat required the sanction of the Reich, in conformity with art. 78 II RV The Weimar constitution speaks of the cultivation of relations with foreign states, and intentionally so, in order to cover just such relations as those between the Vatican and the Lander [26] The dominant opinion dispensed with the assent of the Reich [27] Still, the Bavarian Implementing Act was submitted to the National government "out of courtesy" Chancellor Marx declared, after having consulted the Ministers of For-

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given to them" *Cf* Fleischmann in *HdbDStR* 1, pp 218-219, "Concordats are entered into with the pontifex maximus"

We reject the interpretation of the Bavarian Government the assent of the Landtag to the concordat was unnecessary The characterization of the Protestant covenants as "Administrative Contracts" seems to be correct (so also Oeschey, *loc. cit*, pp 276-277, as quoted by Schoen, *loc cit*, p 350, n 80, *contra*, e g, Schoen, *loc cit*, p 350)

The clausula rebus sic stantibus in concordats Even when adopting the CONTRACT THEORY in one form or another, one should bear in mind the following « *La clause rebus sic stantibus leur [aux concordats] est applicable plus qu'à tous les autres traités . En vérité, a la difference des traités ordinaires, les Concordats sont des conventions faites avec les gouvernements beaucoup plus qu'avec des Etats* » Fauchille, Paul, *Traité de droit international public* (Paris, 1926), p 444

THE REICH ENTERS INTO A CONCORDAT WITH THE CURIA Church and Land concluded a concordat knowing that the Reich might render the effects of the concordat nugatory, though the Reich could not abrogate the concordat directly The tacit condition was therefore attached to any concordat entered into by a German Land and the Curia that the Reich did not enact legal norms in conflict with the Church covenant. If the Reich concluded a concordat (as it did in July, 1933), those prescriptions of the Bavarian concordat which were in conflict with the Reich's concordat became automatically nonoperative Huber, *op. cit*, p 126.

[26] Fleischmann in *HdbDStR* 1, p 216

[27] *Ibid*, p 218, Anschütz, *op cit*, p 364, Schoen, *loc. cit.*, p 337; Huber, *loc cit*, p 91, with an anthology of opinions, p 91, n 6 *Contra, e g*, Hatschek, *op cit*, vol II, p 442 Poetzsch-Heffter, *Handkommentar*, pp. 217, 339-340, denied to the Länder the right of entering into concordats

eign Affairs and of Justice, that the Reich did not "object."[28]

§6 *The State Territory of Bavaria*

1. BAVARIA HAD A TERRITORY OF HER OWN. Bavaria consisted of the territories she possessed on Aug 14, 1919 (par. 1 VU.). The districts of St. Ingbert together with portions of the districts of Homburg and Zweibrücken were parts of the Saar territory, over which, through the treaty of Versailles, Bavaria had lost the exercise of her sovereignty.[1]

The federal territory consisted of the territories of the German Länder (art. 2 RV.). There was no federal territory which was not simultaneously State territory, and vice versa.[2]

2. ALTERATION OF STATE TERRITORY BY AMENDMENT TO THE NATIONAL CONSTITUTION. The territorial status of the States had no value absolute in itself, but was subject to a condition: the National constitution laid down the principle that the division of the Reich into the Lander should serve the economic and cultural advancement of the people with special consideration for the wishes of the population affected. In accordance with this principle, the boundaries might be altered by authority of art 18 I RV., and new States might be erected within the Reich by an amendment to the National constitution. By such a federal amendment Bavaria could be annihilated: the Weimar constitution did not recognize "an indestructible union of indestructible states."

[28] Rothenbücher, *op. cit.*, p. 326
[1] Giese in *HdbDStR* 1, p 232, v. Jan, *op cit.*, p. 18.
[2] Giese in *HdbDStR* 1, p 232

3. INTERSTATE TREATIES AFFECTING TERRITORIES Interstate treaties affecting territories were regulated by art 18 II III RV. Changes in territory could no longer be made by covenants among the Länder involved. Changes in territorial status of the Länder might be affected by ordinary National legislation in two cases. the States affected agreed; or, if one of the States did not agree, the change was demanded by the population concerned in referendum and by an overwhelming interest of the Reich. Otherwise a National law amending the constitution was essential.

An absorption of one State by another took place in the case of the union of Coburg with Bavaria A State treaty between the two Länder was the precursor to the National Law of April 30, 1920. This treaty reflected the concurrent will of the member States in question and regulated the technical execution of the union. Such a merger was endowed with legal consequences, however, only after the passage of the National law.[8]

§7 *The Nationals of Bavaria*

1 BAVARIA HAD NATIONALS OF HER OWN. In principle, the nationality of a State was primary, German nationality was secondary or derivative The federal legislature alone had power, as it already had under the Bismarckian constitution, to lay down the conditions of citizenship (art. 6 (3) RV.), citizenship here signifying nationality of a State as well as nationality of the Federation. The States were not free to vary the terms of admittance to or loss of this citizenship. As a rule, a person could not become a German, unless he became a

[8] Treaties with foreign states affecting state territories were regulated by art 78 III and 45 II RV. *Cf* Anschütz, *op. cit.*, pp. 365-366.

Bavarian, a Prussian, etc ; by ceasing to be a National of a State, a person lost his German citizenship.[1] It is evident that being a Bavarian had a political significance which the status of a Franconian or a Rhinelander had not [2] One might be a National of several German Lander simultaneously [3]

2 EQUALITY OF RIGHTS AND DUTIES OF EVERY GERMAN IN EACH STATE AS THE CITIZENS OF THAT STATE Under the Weimar constitution (art 110 II) every German had in each member State of the Reich the same rights and duties as the citizens of that State. According to the Bismarckian constitution citizens of the Reich who were not also citizens of the State did not share in political advantages. This divergence between the two constitutions manifested itself particularly in the exercise of the suffrage in elections to the State assembly, consequently, through acts which were decisive for the formation of the will of a State. Strictly speaking, the Länder, therefore, lacked a definitely determinable community of persons which alone could be called to enforce the supreme political will [4]

Still, the Länder might properly set up certain requirements which the National of a Land found easier to fulfill than any other German National, e. g , as to residence

[1] German citizenship was regulated by the Statute of June 22, 1913 (*Staatsangehorigkeitsgesetz*)

[2] Sartorius in *HdbDStR* 1, pp 259-260 German nationality without state nationality was possible (pars 1, 33-35 of the *Staatsangehörigkeitsgesetz*) Sartorius in *HdbDStR* 1, pp 267-268 (Example an employee of a German embassy, receiving his wages from the Reich, if he was an alien, might have the direct German nationality conferred on him)

[3] Piloty-Schneider, *Grundriss des Verwaltungsrechts in Bayern und dem Deutschen Reiche* (Leipzig, 1930), p 150

[4] v Freytagh-Loringhoven, Axel, *Die Weimarer Verfassung in Lehre und Wirklichkeit* (München, 1924), p. 43.

in communal elections[5] or training of a particular kind.[6] When privileges were involved which a State, at its discretion, might grant or deny (stipends, dispensations, pardons, etc), art 110 II RV. was not applicable so that, despite the prohibition against discrimination, the non-Bavarian was at a disadvantage in Bavaria [7]

D THE PLAN OF GOVERNMENT OF BAVARIA

§8 I *FEDERAL NORMS GOVERNING THE BAVARIAN CONSTITUTION*

1 HISTORICAL AND COMPARATIVE REMARKS. "Federalism is legalism," according to Dicey's dictum.[1] A federal state requires a certain degree of homogeneity between its own structure and that of its member states in order to secure its political welfare The Bismarckian constitution imposed a constitutional restriction only on Prussia (and then only indirectly) by obliging her to furnish the Empire its Kaiser in the person of her King, so that Prussia was constrained to retain a monarchical form of government [2] The Weimar constitution, in art.

[5] *Cf* §8, n 7, *infra*

[6] Sartorius in *HdbDStR* 1, pp 281-282, Poetzsch-Heffter, *Handkommentar*, pp 409-410, v Jan, *op cit*, p 28

[7] Anschutz, *op cit*, pp 473-474

Also art 16 (1) RV and pars 12 *et seq*, especially par 14 I, of the *Reichswehrgesetz* of March 23, 1921 were restrictions of art 110 II RV Anschutz, *op cit*, pp 120-122 Anschutz, "Der deutsche Föderalismus", *Veröffentlichungen der deutschen Staatsrechtslehrer* (Berlin-Leipzig, 1924), Heft 1, pp 11-34, criticizes the parochial spirit of these provisions (pp 20-21)

Expanding the provisions of Art 128 RV, par 12 VU required the aspirant to public office to possess moral and personal qualifications (*Würdigkeit*)

[1] "A federal state derives its existence from the constitution, just as a corporation derives its existence from the grant by which it is created Hence, every power, legislative, executive or judicial, whether it belong to the nation or to the individual States, is subordinate to and controlled by the constitution" *Law of the Constitution* (London, 1915), p. 140

[2] Wenzel in *HdbDStR* 1, p 604

17 I, followed the model types of republican federal states, the United States of America (art 4 sec. 4) and the Swiss Confederation (art. 6), in prescribing to the Länder norms for their constitutions.

2. CONSTITUTIONAL AUTONOMY. Art 17 RV did not establish the State constitutions but merely imposed upon the Länder the obligation of framing their constitutions in accordance with its principles. Consequently, Bavaria possessed constitutional autonomy, the characteristic of original and inherent power: the Constitution of Aug. 14, 1919 was *her* will, *her* law.[3]

3 REPUBLICAN FORM OF GOVERNMENT. The constitutions of the Lander were required to provide for a republican form of government A monarchy, oligarchy, ochlocracy or a soviet régime was excluded.[4]

The Länder were permitted to have any government selected by the people's assembly as long as it commanded its confidence, a parliamentary government or, e. g., a government modelled on the Swiss system. Therefore, art. 17 RV intentionally omitted the words of art. 54 RV., "for the conduct of their offices", and the sentence, "each of them must retire if the Reichstag withdraws its confidence by an express vote."[5]

The National constitution did not assign definite tasks to a State assembly. The synchronization of the Federal and State constitutions effected by art. 17 RV, together with the principle of the sovereignty of the people expressed in art. 1 RV. caused the assembly, however, to be the keystone of the constitutional arch. The States were allowed to have a State president as an equipoise

[3] *Ibid*, p. 605.
[4] *Ibid*, p 607, Anschütz, *op cit*, p. 125.
[5] Wenzel in *HdbDStR* 1, pp. 615-616.

to the assembly (though the countersignature of a minister would have been required for his state acts).[6]

4. FEDERAL NORMS GOVERNING ELECTIONS. The representative assembly of every one of the Länder had to be elected by universal, equal, direct and secret vote of German citizens, both men and women, according to the principles of proportional representation (with freedom of choice as to the system of the latter). The principles of election for the representative assembly applied also to communal elections, though by State law a residence requirement not exceeding one year of sojourn in the community was allowed to be imposed in such elections (art 17 II RV)[7] The usual immunity from arrest, prosecution and the like was guaranteed to the popular representatives in the States by the *Reich*.[8]

D. II. THE LANDTAG

§9 *Electoral Laws. Examination of Electoral Results*

1 ELECTORAL LAWS. a LEGAL SOURCES. Federal laws influenced the electoral laws of the Lander in various ways. There were relatively few provisions in the National laws having a direct binding force on the State legislators in the matter of electoral stipulations.[1] More

[6] *Ibid*, p 616. It was a matter of controversy whether the Länder were permitted to have a bicameral system The admissibility is denied by Anschütz, *op cit*, p 127, v Jan, *op. cit*, p. 74, Nawiasky, *op. cit*, p 140, *et al.* *Cf* Wenzel in *HdbDStR* 1, p 608, n. 15, also for opposing views

[7] In Bavaria a sojourn of twelve months was required for elections in the communes (v Jan, *op cit*, p 41), and of six months for elections to the county and district assemblies (*ibid*, pp. 32-33)

[8] Wenzel in *HdbDStR* 1, p. 615

[1] In the category of binding provisions belonged those which decreed the abrogation of civil rights entailing incapacity to vote or to stand as deputy (Penal Code, par. 34, no 4), the suspension of the right of voting of soldiers (Defense Law, par. 36, III), no requirement of leave of absence for civil service employees and members of defensive forces for the performance of their parliamentary duties(art. 39 RV.).

important were the normative regulations of the Weimar constitution, particularly those contained in art 17 [2] As the National constitution did not introduce the principles of a State electoral law through art 17 but only made their introduction and elaboration mandatory on the Lander, it was proper that the Bamberg constitution repeated this article in par 26

The wizards of the Bavarian electoral system threw into the cauldron of their electoral laws of May 12, 1920, July 21, 1921, Feb. 6, 1924, July 18, 1925, and March 3, 1931 precious extracts collected in England and Switzerland, added one ounce of universal knowledge and one ounce of domestic ingenuity, and produced that very strange homunculus, the Bavarian Electoral System. The results were so confused that constitutional controversies were engendered which violently agitated the Landtag for several years, and the Bavarian Staatsgerichtshof, in its decision of Feb 20, 1930, was forced to declare the then existing electoral law to be unconstitutional [3]

b. SUFFRAGE and ELIGIBILITY were regulated in the constitution of Aug. 14, 1919 and in the electoral law of May 12, 1920 (pars 8-9 VU , art 17 I RV , art. I LWG.; par. 26 II VU , arts. 40-44 LWG) The right to vote in Landtag elections was conferred upon German citizens who, on election day, had completed their twentieth year[4] and were not mere transients [5] Those who had the

[2] Jellinek in *HdbDStR* 1, p 623

[3] *Cf* §21 (3), *infra*

[4] There was no Federal prescription to that effect German Nationalist circles advocated an increase in the age limit of twenty years In fact, it was an anomaly that the vote was given to minors who, in the eyes of the civil law, were considered incapable of looking after their own affairs, and were at the same time credited with a mind mature enough to judge rationally on public affairs

[5] Bavarian State employees (and their household) living outside of

suffrage and had completed their twenty-fifth year on election day, in possession of German citizenship for at least one year, and residents of Bavaria for at least one year, were eligible to be seated [6] No public office was incompatible with membership in the Landtag, nor did a member vacate his seat by accepting public office.[7] Deputies were elected for four years (par. 27 VU ; art 40 LWG)

c FORMAL REQUIREMENTS The exercise of the ballot was predicated on an enrollment in voting lists (which were kept by the communes in ledger form or on cards) or on the possession of a certificate entitling a voter away from home to vote in any constituency in which he happened to be staying (arts 4, 7-17 LWG) Election day was a Sunday or a general public holiday (art. 33 LWG.).

d ELECTORAL DISTRICTS. For election purposes the whole country was divided into eight electoral districts corresponding to the eight counties A preliminary number of seats was allocated to each electoral district (Upper Bavaria 25, Lower Bavaria 12, the Palatinate 14, Upper Palatinate 10, Upper Franconia with Coburg 12, Middle Franconia 15, Lower Franconia 12, Suebia 13) To these 113 seats fifteen were added (originally there

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Bavaria had the suffrage as a special concession (art. 9 LWG) There were certain disqualifications which rendered both men and women ineligible to be enrolled as voters in parliamentary elections suffrage-abrogating disqualifications for the certified insane, interdicted prodigals, criminals, suffrage-suspending disqualifications for soldiers, suffrage-preventing disqualifications for persons lodged in jails or in asylums for the insane (par 9 VU., art 2 LWG)

[6] Art 45 LWG enumerated seven reasons why a deputy could lose his seat Bavaria was one of the few Lander whose electoral law contained provisions against corrupt practices (arts 18-21 LWG). Jellinek in *HdbDStR* 1, p 625

[7] Tatarin-Tarnheyden in *HdbDStR* 1, pp 422-423.

were fifteen deputies-at-large) so that, after the Statute of March 3, 1931, 128 deputies were elected in eight electoral districts (arts 41-42 LWG).[8] The electoral districts (*Wahlkreise*) were divided into as many voting districts (*Stimmkreise*) as there were deputies to be elected in the electoral districts (art. 43 LWG.).[9]

e. PROPORTIONAL REPRESENTATION. The Landtag was elected, like the legislatures of the Reich and the other Lander, by proportional representation. In theory proportional representation aims to record the political views of the individual citizens with mathematical accuracy. In practice proportional representation encouraged the pernicious tendency of the Germans to crystallize their political philosophies in a multiplicity of parties and thereby increased the difficulty of forming a stable government and a single and undisrupted state will. While proportional representation granted the maximum of justice to the individual, it did an injustice to the state.[10] In Germany proportional representation also led to party oligarchy (*Bonzokratie*) and "was a dangerous source of misrepresentation of the dynamic inventive impulses of a party" (Finer). The spoils system, which

[8] v. Jan, *JöR* (1931), vol. 19, p 16.

[9] There was one deputy for about 62,000 inhabitants v. Jan, *op cit*, p. 74 In the Landtag elections of May 20, 1928 74,1% of men and women having the suffrage voted *Statistisches Jahrbuch für den Freistaat Bayern* (Munchen, 1928), pp. 608, 624 for percentages

[10] "Democratic government rests, in its hopes and doubts, upon the party system There is the political centre of gravity . . If the divisions of men . cannot be amicably assembled in parties not confusing to the electorate, if desire for complete victory wrecks temperateness, and passion blinds to truth, if the men who form the organizations are not considerate and patient in their research and pursuit of policies, and do not establish a permanent and generous reciprocity in matters electoral . . — in that measure democracy is not only despised . . . , but a rot enters the vitals of the actors themselves" Finer, *op. cit.*, p. 624

follows in the wake of the "boss system", plagued other Länder more than Bavaria. The intransigeance of the party system, accentuated by proportional representation, favored the seasoned party men and blocked the chances of advancement of the younger generation. German youth, irrespective of party affiliations, united in hatred of party life in general The Hitler movement, a youth movement, finds its explanation in part in the revolt against on oligarchic boss system.[11]

f. PROCEDURE. In contrast to the National electoral law, the Bavarian voter had the choice of giving his vote to a specific candidate of his party in his voting district or to a corresponding fraction of a party list.[12] No mongrel or mugwump or maverick could make his way into the party lists, a member had to be in thoroughly good standing. An election board for each district, also a State election board, the latter under the chairmanship of the president of the administrative court, were provided for (arts 5-6 LWG.).

The votes were first figured according to the improved Hare system (art 54 II LWG). The votes not used for distribution in the eight electoral districts (residual votes) were pooled into one State electoral list (*Gesamtwahlvorschlag*, arts 54 III-55 I LWG). They were then distributed, on the strength of a new calculation, according to the Hagenbach-Bischoff system among the seats not allotted heretofore for the purpose of determining the number of such seats to which each party

[11]Koellreutter, Otto, *Die Staatslehre Oswald Spenglers* (Jena, 1924), pp 37 *et seq*; Grabowsky, Adolf, *Politik* (Berlin-Wien, 1932), pp. 130, 254.

[12] Art 51 LWG. This system was imported from Switzerland. Jellinek in *HdbDStR* 1, p 629

was still entitled (art 55 II, III LWG).[13] As the State electoral list did not contain candidates of its own, seats distributed on the strength of it were re-allocated to that county electoral list which had transferred to it the highest number of residual votes (art. 55 V LWG)

It happened that the electoral district was not ordinarily entitled to the receipt of any additional deputy, as the number assigned to it had already been reached. Art 55 LWG, however, departed from the principle of an attempted rigid allocation of a definite number of deputies and permitted an additional seat to fall into the district

If an elected deputy declined the election or later resigned from the Landtag, his place was taken, without a new election, by the non-elected candidate who led the same party list (art 61 II LWG). In case an election had been invalidated by the Landtag, a new election was resorted to If a party elected an additional candidate, the first substitute on the State list was the elected deputy, conversely, the last deputy of the electoral district which had fed the State list with the least residual votes vacated his seat (par 64 I II LWG)[14]

2 EXAMINATION OF ELECTORAL RESULTS The Landtag was its own arbiter as to the right of membership therein and the validity of elections (par 33 VU). It was permitted to delegate this examination to the "cold neutrality of a judge" (Burke), a court (par. 33 (2)

[13] *Ibid*, p 627, Meindel, Fritz, *Die Entwicklung des bayerischen Landtagwahlrechts* (Diss Erlangen, 1929), pp 65-77

Residual votes were counted only if a party elected a candidate in one of the county electoral districts (art 55 IV, LWG). This provision directed against "splinter parties" led to constitutional controversies It was upheld by the Bavarian Staatsgerichtshof v Jan, *JöR* (1931), vol 19, pp 11-12

[14] Meindel, *op cit.*, pp 72-74

VU.), but in practice never made use of this right In the Electoral Law the Landtag expressly reaffirmed its prerogative and declared it to be exclusive (art. 62 LWG) On the basis of par 10 II (2) GO a committee first examined the contested elections and then reported to the Landtag which rendered a final decision.[15] Through the declaration of invalidity a deputy lost his seat (par. 41 I VU , art 45 (4) LWG.).

§10 *The Political Competences of the Landtag*

The Landtag, composed as it was of the representatives of the Bavarian people in a sociological-political sense, was, according to the will of the Bamberg constitution, the most important political organ in Bavaria. Within the boundaries of the Weimar and Bamberg constitutions the Landtag considered all subjects it deemed appropriate for its deliberations.[1]

In accordance with its constitutional position the Landtag participated in all functions of the State: the constituent power (par 92 VU.), legislation (par. 44 VU)[2] with the aid of the initiative on all matters subject to its

[15] Stoll, Werner, *Die Rechte des Landtags nach der alten und neuen bayerischen Verfassung* (Diss Erlangen, 1927), p 81 In the Reich (and in Prussia) electoral claims and objections were passed upon by a court. v Jan, *op cit*, p 85

[1] Leibholz in *HdbDStR* 1, p 631. The Landtag was dissolved by National decree of Oct 14, 1933 and permanently abolished by the Reich Reform Bill of Jan 30, 1934 *Current History*, March, 1934, p 741.

[2] The division of legislative powers between the Reich and the Länder was too involved to be satisfactorily treated — *en passant*, as it were — in a monograph on a single state (Nawiasky, *op cit.*, p 58) A few remarks must suffice

According to the dominant opinion the authority of the Länder in legislation was presumed (Lassar in *HdbDStR* 1, p 309) Nevertheless, the National Union was given the right of *exclusive legislation* over a range of topics quantitatively and qualitatively the most important in the entire sphere of governmental activities (Lassar in *HdbDStR* i, pp 304-305).

jurisdiction,[3] administration and its supervision,[4] and administration of justice.[5]

The Bavarian Landtag was reduced to legislation concerning:

a Self-organization (under the limitation of the Weimar constitution); *cf* §8, *supra*,
b. Affairs of local administration, *cf.* §17-18, *infra*
c Churches and Schools (Piloty-Schneider, *op cit*, pp 229-244, *cf.* pars 18-21 VU),
d. Agriculture (*ibid*, pp 209-220);
e Forestry (*ibid.*, pp 225-227),
f Hunting and fishing (*ibid.*, pp 220-225);
g. Status of officials, with limitations (pars. 67-68 VU., v. Jan, *op. cit.*, p 139), etc (*Cf.* Lassar in *HdbDStR* 1, pp. 311, 317- 321); Hatschek, *op. cit.*, 1, p 91, Poetzsch-Heffter, *Handkommentar*, p. 104).

The activity of the Lander, Bavaria included, in the fields of *concurrent legislation* (Lassar in *HdbDStR* 1, pp. 305 *et seq.*) became "*en quelque façon nulle*" (*ibid*, pp 311, 320-321) The concurrent legislation consisted of matters on which the Weimar constitution gave the Reich the right of legislating without thereby excluding the legislative rights of the States (*ibid*, pp 305-309). An example of one of the few subjects which the Reich did not choose to regulate is mining (art 7 (16) RV). Therefore the Bavarian mining laws of March 20, 1869 and Aug 13, 1910 remained in force (Piloty-Schneider, *op cit.*, pp 227-229)

The plethoric financial policy of the Reich, particularly the creation of establishments endowed with a capital structure of their own, took from the Lander all "resiliency" (Finer) so that lack of resources handicapped the member States in solving individual problems. Lassar in *HdbDStR* 1, p. 318

The division of authority between the Reich and the Lander was precise and rigorous, nevertheless, conflicts arose between the two. In such cases it was natural that the Reich claimed priority for its laws, as expressed by the legal apothegm, "*Reichsrecht bricht Landrecht*" (art. 13 RV, art 103 RV. was an exception)

[3] In practice the projects of the Cabinet were always in the foreground As a rule, bills were drafted by the minister to whose department the subject-matter belonged and presented by him to the Cabinet which then introduced them in the Landtag *Cf.* par 61, no. 8 VU.

[4] Administrative functions conferred on the Landtag were the following:

a. Nomination of the ministry (pars. 4, 58 VU.);
b Collaboration in the organization of authorities (*Behörden*) (par. 46 VU),
c. Financial administration (pars 47-49 VU.);
d Foreign administration (par. 50 VU.),
e Supervision over the administrative apparatus (pars 52-56, 59, 65 IV VU).

[5] E g, examination of electoral results (par. 33 VU), amnesties (par 51 VU.) *Cf.* Leibholz in *HdbDStR* i, p. 642

Concerning the exercise of the functions of Staatsgewalt[6] — legislative (par. 44 VU.), executive (pars. 4, 57 VU.) and judicial (pars 5, 69 VU.) — there was a presumption in favor of the Landtag,[7] unless a specific provision of the Weimar or Bamberg constitutions allocated individual rights to the State citizenry,[8] authorities,[9] or aggregations of autonomous administration[10] (par. 3 I VU) [11]

While from a static standpoint the constitution created a pluralistic distribution of functions between the Landtag, Ministry and the Courts, from a dynamic point of view the parliamentary system reestablished a monism of executive and legislative powers

§11 *The Legal Position of the Members of the Landtag*

Each member of the Landtag had the right and duty to participate in the tasks set before the Assembly. The right was in abeyance while the deputy was suspended. A member was excused from the duty of participation

[6] *Cf* § 3 (2), *supra*

[7] v. Jan, *op. cit.*, pp. 22-23

[8] The rights of the citizenry as a State organ were restricted to.
a Popular initiation concerning the People's legislation (pars 10, 76 III, 77 VU) as well as the convocation and dissolution of the Landtag (par. 30 I, V VU.);
b Referendums concerning the People's legislation (pars 76-77 VU) as well as the dissolution of the Landtag (par 30 V VU.);
c Election of the Landtag (par 26 VU.)

[9] The cabinet (par. 4 VU), the individual ministers (par. 61 VU.), administrative authorities (par 69 VU), the courts (pars 5, 69 VU.), the Staatsgerichtshof (pars. 56, 70, 93 VU.), the Supreme Court (*Oberstes Landesgericht*) (par 70 II VU), administrative courts (pars. 70-71 VU.), the court of conflicts (par 69 VU.).

[10] Communes, districts and counties (pars 22-23 VU.), professional associations (par 24 VU)

[11] Leibholz in *HdbDStR* 1, p 631, n. 5 criticizes the presumption in favor of the Landtag in disputes of competence as being incompatible with the sovereignty of the people (par. 2 (1) VU). Nawiasky, *op cit*, p 75, speaks in this connection of a "degradation" of the people to the position of a mere State organ.

when on furlough. He proved his presence by giving his name to a secretary, by inscribing it on lists of speakers or through public vote He was not permitted to disclose what went on in sittings behind closed doors [1]

In order that the Landtag should not be impeded in the exercise of its functions by other organs of the State, the members were guaranteed the undisturbed performance of their "parliamentary profession" through safeguards of their material immunity (par. 37 I VU ; art 36 RV — professional freedom from responsibility) and procedural immunity (a par 39 I, II VU , art 37 RV — freedom from criminal prosecution, b par 39 III VU — local privilege of testimony; c par 37 II VU , art 38 RV. — privilege of refusal of testimony concerning affairs the knowledge of which was acquired professionally) These were not primarily personal privileges of the deputies,[2] "as they basked only in the reflected glory that shone from the House" (Heinrich Oppenheimer), but they formed a protection of the whole body against outside interference.[3]

§12 *The Corporate Competences of the Landtag*

1 DEFINITION OF CORPORATE COMPETENCES.

The corporate competences (or internal autonomy) of an assembly are those which assure its freedom from

[1] Perels in *HdbDStR* 1, p 643 The right of a member to submit proposals (*Anträge*, the French *propositions*) was regulated by par. 36 VU and restricted by pars 41, 52, 55-56 VU and pars 13, 23, 26-27, 35, 37, 41 GO

[2] v Jan, *op cit*, pp 89, 93

[3] The compensation of deputies (*Diäten*) was regulated by a statute of Feb 13, 1931 and consisted of RM 280 monthly for members of the Landtag living in Munich and of RM 420 for deputies living outside of Munich (plus free transportation) An additional compensation of eight and ten marks was granted to committee members The compensation of the president was RM. 300 v Jan, *JöR* (1931), vol 19, p 7 *Cf* par 40 VU

external influence and interference and enable it to exercise its political competences smoothly and independently.

2 RULES OF PROCEDURE. Par. 28 VU. conferred on the Landtag the right of determining its organization, its mode of procedure and its discipline through rules of procedure (*Geschäftsordnung*[1] *für den Bayerischen Landtag* of March, 9, 1923, with amendments). Standing orders are in reality formidable instruments in the hands of parties and have a decisive influence on the efficiency of a legislature.[2]

3 THE CONVOCATION OF THE LANDTAG was in principle independent of an act on the part of the Cabinet The newly elected Landtag was convoked by its three senior members within seventeen days after the election results were officially established (par 30 II VU , par 1 GO.) and opened by the oldest member (par 1 III GO). In all other cases, whether they involved ordinary or extraordinary sessions, the Speaker of the House (*Landtagspräsident*) summoned, opened and adjourned the session (par. 30 II VU).

At least once a year, and not later than October first, at which date the budget was presented to the Landtag (par 79 II VU.), the Landtag was convoked in ordinary session. An extraordinary session had to be called if the bureau of the Landtag so resolved, or on petition of fifty deputies (par 30 I (2) VU.)

The principle of self-convocation was departed from by the provision that an extraordinary session could be summoned on petition of the Cabinet or one-fifth of all

[1] Abbreviated as GO

[2] Pierre, Eugène, *Traité de droit politique, électoral et parlementaire* (Paris, 1910), p 490 *Cf.* v Jan, *JöR* (1931), vol 19, p 6, concerning amendments of the rules by simple majority.

citizens having the suffrage (pars 30 I (2), 10 I (3), II VU , art 29 LWG.).

4. LEGISLATIVE PERIOD. SESSIONS The Landtag was elected for a period of four years. Before the expiration of this time a new Landtag was elected (par 27 VU.) The expiration of the legislative period and dissolution of the Landtag entailed a complete cessation of all busines on hand. The subsequent Landtag treated all business afresh, as if there had been no previous legislature. While there was continuity between the single sessions, there was discontinuity between the different legislative periods [3] The Landtag remained in session until, on its own account, it suspended its activities (par 30 III VU). Intervals in the sittings at Christmas, Easter or on other special occasions were spoken of as adjournments (*Vertagungen*).[4]

5 THE DISSOLUTION OF THE LANDTAG. In case of the dissolution of the Landtag (through a resolution of the Landtag, par 31 VU , or through referendum, par. 30 V VU) or the expiration of its period, the Cabinet (or the minister to whom this duty was delegated) decreed new elections (par. 65 V VU.).

In the event of a dissolution of the Landtag, elections were to be held with alacrity, they had to be so timely that the new Landtag could convene within sixty days of the dissolution of the old Landtag (par 32 VU) But if a Cabinet had violated this provision, no effective remedy could have been applied — a defect in the constitution —, as the permanent committee established by the old Landtag had neither the right of expressing its want

[3] Nawiasky, *op cit*, pp 139-140 In 1927/1928 there were forty sittings, in 1928/1929 fifty-two

[4] v Jan, *op cit*, p 81

of confidence, nor of haling the Cabinet before the Staatsgerichtshof, nor of issuing writs of election on its own account.

In the event of the end of a legislative period, the Bavarian constitution relied on pre-established law unequivocally interpreted. In such a case the new Landtag was elected before the end of the period (par 27 VU.) so that the old Landtag could take censorious measures if the Cabinet did not issue writs of election [5]

6 THE INTERNAL ORGANIZATION OF THE LANDTAG a THE BUREAU. In accordance with its competence of autonomous organization the Landtag elected its bureau (*Vorstand*), composed of a president, first and second vice-president and four secretaries, for the legislative period of four years (par 28 VU , pars. 2-7 GO.). These officers were assisted in certain matters by the council of Elders [6] They continued to function until a new Landtag assembled (Statute of Nov. 1, 1923).

b. THE PRESIDENT conducted the current business of the Landtag and was its representative He presided over the deliberations and maintained discipline in the sittings (par. 5 GO.). Together with the Cabinet he compiled and promulgated the statutes passed by the Landtag (par 62 I VU) [7]

[5] Orth, Hermann, *Das Verhältnis des Ministeriums zum Landtag in Bayern* (Diss Wurzburg, 1928), pp 46-47

[6] Representation in the bureau, council of Elders, etc , was determined by party strength (par 8 II GO) In case of a change in party strength, the members of the bureau were supposed to resign under par 8 II (2) GO As this provision was in contravention of par 28 I VU , it was held unconstitutional Stoll, *op cit*, p 82

The bureau appointed the employees of the Landtag (*cf* par 29 VU)

[7] The intensity of party passion, produced by religious, economic and cultural differences, imposed a heavy strain upon the effectiveness and impartiality of the president. The president remained a party man.

c THE COUNCIL OF ELDERS was the political center of gravity as to procedure and conduct of business in the Landtag [8] It supported the president in the management of affairs and especially effected an understanding among the party groups, — "battle fellowships established in the form of a permanent association to obtain power over the state with the view to realizing political aims" (Triepel). A party group had a minimum membership of five (par. 8 GO.). The council of Elders also regulated the distribution of committee memberships and their substitutes (par 9 GO.).

d THE COMMITTEES (1) ORDINARY COMMITTEES The committees, which met under conditions of close personal contact and in a frame of mind that gave birth to rational accommodation, were the following (par 10 II GO) · 1. Rules of Procedure, 2 Electoral Claims, 3 Budget, 4. Economic Affairs, 5. Petitions and Complaints, 6 Constitutional Questions

The basis for selecting the committees was the party group Each party group nominated one or more members of every committee (consisting of from fourteen to twenty-eight members) according to the principles of proportional representation. This meant that the majority bloc had a majority on every committee, but par. 42 VU. expressly stipulated that the minority had to be represented on these committees.

All important measures, besides being referred to committees, were considered by the members of each party at a caucus These caucuses, whether of single parties or of blocs, gave instructions to their representatives on the committees. Hence the deliberations of the Land-

[8] Nawiasky, *op cit*, p 142

tag as a whole were virtually controlled by these caucuses

The *plenum* of the Landtag was merely the place for the formal registration of the resolutions made in the committees. Speeches in the full assembly were explanations and advertisements and concerned electoral strategy; they had little effect [9]

(2) The Bamberg constitution laid down the principle that the Landtag had to be continually active in the conduct of the State's affairs. In order to avoid a vacuum and forestall a paralysis, the constitution provided as follows for contingencies such as vacations, dissolution of the Landtag, and end of the electoral period.

An INTERSESSIONAL COMMITTEE of twenty-eight members was appointed by the Landtag for the time between two sessions and was endowed by it with definite prerogatives (par. 30 III VU), which ordinarily embraced all but legislative measures [10] It is self-evident that the Landtag could not transfer more competences that it had itself Par 3 II VU expressly stipulated that the rights and functions of the Landtag were non-transferable, unless the constitution made a provision to the contrary.[11] In practice these rights were sufficient to assure control over the Government's activities.[12]

A PERMANENT COMMITTEE was set up between two electoral periods (par. 30 IV VU) to "safeguard the interests of the legislature." Such a committee had *ipso iure* the same rights as the Landtag, but whether

[9] Nawiasky, *op cit*, p. 172

[10] v Jan, *op cit*, p 81.

[11] These are the cases of par 30 III and IV concerning the Intersessional and Permanent Committees, the examination of electoral results (par 33 VU), the grant to the Cabinet to issue statutory ordinances (par 61 (7) VU.)

[12] Orth, *op cit*, pp 94-95.

it had the right to legislate was a matter of controversy [13]

7 DELIBERATIONS AND PROCEDURE. a. THE ATMOSPHERE IN THE LANDTAG. In comparing the parliamentary debates in the Reichstag with those in the Bavarian Landtag, one should consider that the parochial conditions of the component States bred a provincial spirit with its overdrawn supervisory tendencies. Inasmuch as only a relatively narrow orbit of competences was left to the member States, debates could not aspire to heights that revolved around *la grande politique*. The Landtag was apt to be to-day Briand's *mare stagnante*, and to-morrow show Burke's "confused and scuffling bustle of local agency." Trifling regulations of a prosaic kind are topics that may hold the actors, but not the audience.

The relationship between deputies and electors was closely knit in Bavaria In this particular atmosphere a delegate easily became the *député de clocher*. There was dawdling and pottering. Servile obedience to the petty whims of popular constituencies (*"campanilismo"*) led to a facile gratification of an individual elector's desire to see his cause championed in the forum of his country with commendable verve, where, to paraphrase Burke, the meanness of the object was redeemed by the dignity of the business

The atmosphere in the Landtag, as a rule, was one of friendly camaraderie, which condemned acridity and vindictiveness [14] Still, the demeanor of the Landtag

[13] The right was denied by Nawiasky, *op cit*, p 137, affirmed by the Landtag (v Jan, *op. cit*, p 81). At any rate the committee never attempted to pass statutes

[14] The general tone that prevailed in the Landtag was described by its president, in the sitting of July 16, 1930, as "sporadically rough, but always cordial." *Stenographische Berichte*, No 82, p 203.

was subject to crises. When political friendship ceased, "the partitions were drawn high in Bavaria between parties" [15] *la politique n'a pas d'entrailles,* and Bavarian eupatridæ could heap as many diatribes on one another as the heroes of Homer. The effervescent spirits of the Nazis for instance created an ear-splitting pandemonium in the July, 1932 sittings. The target of the epithets and objurgations of the Hitlerites was Dr. Stang, the president of the Landtag and a member of the Bavarian People's Party. He was accused by Dr Buttmann, the Nazi leader, of falsifications of the stenographic records [16] Party strife that reaches this degree of violence must be regarded as an "inflammatory disease of the body politic" (Sidgwick)

b. PUBLIC SITTINGS The sittings of the Landtag were public (*cf* par. 43 VU) The public was excluded or restricted upon motion of the president, fifteen members, a minister or his substitute (par. 27 GO). The president opened, conducted and closed the sittings (par. 28 GO).

c THE FORMAL MARCH OF ALL BILLS[17] and state treaties was through two readings. Between these two readings there was a minimum interval of two full days (par 14 III GO) to avoid surprise and want of due consideration. Each reading fell into two parts: a general discussion and a discussion of the articles (the French *discussion générale et passage aux articles*), unless linked by special permission of the Landtag (par. 14 II (1-2) GO.).

[15] A phrase of the president of the Landtag. *Stenographische Berichte, loc cit*

[16] *Münchner Neuesten Nachrichten,* July 18, 1932, p 2

True and accurate reports of the proceedings at the public sittings were privileged matters (par 38 VU., art. 30 RV)

[17] After introduction bills were printed and copies were transmitted to the ministers and members of the Landtag (par 13 IX GO.)

Amendments, permissible till the closure of the second reading, were submitted in writing (par. 14 IV GO) and could also be proposed by the Cabinet (par. 14 V GO.). On motion, bills were sent back to a committee (par. 14 IV (3) GO.).

The Cabinet was again in command from the beginning of the first reading to the ultimate vote on the second reading The committee ceased to be responsible for the report, after the deposit of the report, the committee members, as far as the bill was concerned, returned to their party groupings

d RULES CONCERNING DEBATES Members who wished to speak on a measure turned in their names to the secretaries and were inscribed on lists (par. 32 II GO.). No limit was set to the duration of speeches (par. 35 GO). Upon motion of fifteen members the Landtag curtailed the number of speakers or the duration of speeches A Government member had the right to speak after closure, but with the proviso — the Landtag was jealous of its privileges — that such permission, upon motion of a member, involved the reopening of the debate (par. 32 VII GO). The speaker, unless a Government representative, was not permitted to read his speech from a manuscript (par. 33 GO). As a rule, he mounted a tribune and — so asks Poincaré — "who can avoid self-consciousness in such a situation?"

8 METHODS OF VOTING The rough and ready plan usually adopted was for the Ayes to rise and to be counted. If the secretaries did not agree as to the result, the Nays were asked to stand up (par. 41 GO.) If the secretaries were still in disagreement, or on petition of thirty members, the Ayes and Noes and those who wished to abstain from voting cast a public ballot in alphabetical

order. The votes were recorded in the stenographic reports (pars. 41-42 GO).

Except in cases of self-dissolution, vote of lack of confidence, impeachment of a minister, election of the prime minister, election of the parliamentary members of the Staatsgerichtshof, or increase of expenditures against the wish of the ministry and constitutional amendments (pars 31, 55 IV, 56 II, 58 I, 70 II, 81, 92 VU.), the Landtag voted by majority of the Yeas and Nays. Sixty-five members constituted a quorum (par. 34 VU).

9. DISCIPLINE IN THE SITTINGS. To check turbulent scenes inimical to the dignity of parliamentarism, "an edifice of conventions erected on a very fragile basis of civilization" (Finer), the regulations drew up a scale of penalties (par. 31 GO.).

D. III. THE STATE CITIZENRY

§13 *The Initiative and Referendum*

1. THE INITIATIVE The Bavarian State citizens,[1] concurrently with the Landtag, had legislative power, with a resulting emasculation of the principle of representative democracy [2] The initiative and referendum— ancillary political devices, the products of distrust, "the elastic arrangements" (Bagehot) to test the will of demos — are the equipoise to the representative democratic system. They were inserted in the Bavarian constitution as a safety-valve and corrective against parliamentary autocracy and party dictatorship, *il n'y a pas de bon dictateur* (Jèze), not even a legislative body

Popular initiation was limited by provision exacting

[1] *Cf* § 3 (2) n. 14, *supra*
[2] *Cf*. §10, n. 8, *supra*.

a draft bill, by restrictions to specific subjects and by the stipulation of a detailed, reasoned petition (par. 76 II VU).

The Bamberg constitution allowed popular initiation:

a for the enactment, amendment or abrogation of statutes and the amendment of the constitution ("statutory or constitutional initiative"), giving birth to a legislative procedure (par. 10 I (1, 2), VU);
b for the intervention in a legislative procedure, when a revision of a statute enacted by the Landtag was demanded ("the initiative summoning a referendum") (par 77 II VU),
c for the re-intervention in a legislative procedure, when the Landtag had passed a statute in unaltered form as demanded in a preceding popular initiation ("the succeeding initiative summoning a referendum") (par 76 III (4) VU),[3]
d for the convocation and dissolution of the Landtag (pars. 10 I (3), 30 V VU)

In the cases under d. and in the case of constitutional amendments the initiative had to be petitioned by one-fifth of the citizenry, in the other cases by one-tenth (par. 10 II VU).

The procedure was regulated in the Electoral Law (arts 22-29). Popular initiation was conditioned on the signature of 1,000 citizens entitled to vote, or on the petition of an association submitting evidence that at least 20,000 of its members, who possessed the franchise, supported it.[4] If the Ministry of the Interior regarded the foregoing requirements as not fulfilled, it secured a decision of the *Landtag* If the requirements were met,

[3] The designations of the different kinds of popular initiation are those of Nawiasky, (*op. cit*, p 294) It might have happened that the opinion of the majority of the State citizens was in disharmony with the opinions of the majority of their representatives in the Landtag and of the petitioners of the popular initiation therefore the case ad c. Nawiasky, *op cit*, p 293.

[4] Occupational associations (lawyers', physicians', etc.) petitioned the Landtag concerning proposals within their spheres of activities Heyland in *HdbDStR* II, pp 195-196 In legislative matters they were not entitled to a reply; in administrative matters they could demand a rejoinder Par 24 VU. was an expansion of art 126 RV. v. Jan, *op cit*., p 71.

the Ministry of the Interior prescribed the term during which the subscriptions to the initiative were to be procured. The subscriptions were recorded in lists sent by the petitioners to the communes. The total result was gathered by the State electoral committee. The Landtag then passed final judgment on the admissibility[5] of the initiative and its legality[6] and appropriate resolutions thereon [7]

2. THE REFERENDUM The Bamberg constitution moved towards a referendum like the pilgrims that journeyed towards Compostella, by taking two steps forward, and one back A proposal for a referendum could be vitiated by a resolution of the Landtag declaring the bill before the legislature to be an urgent measure (par. 77 I (6) VU.), a provision which had a fatal effect on the efficacy of the referendum.[8]

A referendum took place

a. if the Landtag did not enact into statute in unaltered form a bill proposed by an initiative of the people (par. 76 III VU),

[5] A proposal had to conform to pars 10 I, 76 II, III (4), 77 II VU and arts 22-29 LWG, nor was it permitted to contravene National laws or par 77 I, IV VU

[6] Legality presupposed the participation and number of votes decreed in par 10 II VU

[7] v Jan, *op. cit.*, pp 37, 149, and *JöR* (1927), vol 15, p 17. *Cf* §14 (6), *infra*, for references to actual cases *Cf* also *Statistisches Jahrbuch für den Freistaat Bayern* (Munchen), 1924, p 476, 1926, p 628

[8] Through a constitutional amendment, designated as urgent, the Landtag could abrogate the rights of the citizenry *in toto* Nawiasky, *op cit.*, p. 284 The "Act to Implement the Church Covenants of January 15, 1925" was passed under the urgency clause The majority parties in power (Bavarian People's Party, German Nationalists) did not wish a referendum brought about by the adversaries of the Church covenants The confessional peace, disturbed in the raging sea of political passions, was to be restored as speedily as possible. To frustrate an appeal to the people a declaration of urgency was passed. Steiner, Franz, *Die Verträge des bayerischen Staates mit der evangelisch-lutherischen Kirche in Bayern r d Rh. und der pfälzischen Landeskirche* (Diss. Wurzburg, 1928), p 19

b. if the Cabinet or an initiative of the people demanded a revision of a statute passed by the Landtag without a preceding initiative (par. 77 II VU),
c. if one-fifth of the citizenry demanded the dissolution of the Landtag (par 30 V VU.).

When the question to be decided involved a statute, at least one-fifth of those who had the right of suffrage had to vote if it was to be binding; when an amendment to the constitution was involved, at least two-fifths had to vote. In the first case decisions were taken by simple majority; in the second case a majority of two-thirds of the votes cast was required for the adoption of the amendment (par 10 III VU.). On petitions for the dissolution of the Landtag at least one-half of all those entitled to vote had to participate; the Landtag was dissolved if two-thirds of all valid votes were cast in favor of a dissolution (par 30 V VU) and the president of the Landtag took the necessary measures for a dissolution (par. 30 VI VU) [9]

Referendums were not permitted on financial and tax statutes, state treaties, minor frontier changes, the installation of administrative bureaus, salaries of state functionaries, statutes to supplement federal laws, or statutes designated as urgent by the Landtag (par. 77 I (1-6) VU.).

The procedure was regulated in the Electoral Law of May 12, 1920 (arts. 30-39, 66-73). The date of the referendum was fixed by the Ministry of the Interior, after the Landtag had sanctioned the admissibility of the referendum (par. 45 VU.), and the procedure was molded along the lines that governed the election of the Landtag. The question to be put to the people had to be so

[9] The president was held to take these measures "as soon as possible" If he failed to act, the Cabinet could initiate a constitutional dispute under par. 2 (3) StGHG v Jan, *op cit.*, p 82.

phrased that it could be answered by "Yes" or "No". The result was passed upon by the State electoral committee. The Landtag then decided what consequences were constitutionally to be drawn from the referendum. An initiative rejected by a referendum could not be repeated before the lapse of a year, and in the case of constitutional amendments, not before three years had passed.[10]

D IV THE MINISTRY

§14 *The Cabinet as Parliamentary Government*

1. THE POSITION OF THE CABINET WITHIN THE FRAME OF THE CONSTITUTION. Having its roots in the constitution, the ministry was an independent executive organ chosen by the Landtag, as described below, and responsible to it, legally and politically, for its ommissions and commissions Through creation by, and responsibility to, the Landtag, however, no relation of principal and agent was constituted in the sense that the Landtag authorized the Cabinet to head the Government within the scope of its competence. Its authority for the performance of its multifarious tasks was explicitly anchored in the constitution [1]

2 THE POLITICAL RELATIONS OF THE CABINET TO THE LANDTAG. The relationship between Government and Landtag under the Bamberg constitution can be divided into three periods, namely the period 1919-1924, 1924-1930 and 1930-1933.

a. In the first period the Landtag maintained that preponderance of influence over the Government which the constitution contemplated. It is true that theoretically

[10] v Jan, *JöR* (1927), vol. 15, pp. 17-18.
[1] Orth, *op cit*, pp. 26-27

Montesquieu's dogma of the division of powers was posited in the Bavarian constitution. In practice, however, the parliamentary rights with which the Landtag was endowed easily led to its overlordship, to a *gouvernocratie parlementaire*[2], or at least to a severe restriction of the executive, which became the more evident the less forbearance and discretion the Landtag used in the exercises of its prerogatives, and the less malleability and tact the Cabinet exhibited in avoiding friction. The shoals of a successful cooperation could be passed only if the two boats carried little self-assertion and could be turned readily to suit the intricacies of passage. The Landtag which, during the debates on the framing of the constitution, was already regarded as the chief organ of the State — thanks to the influence the constitution accorded it relative to the administration of the Ministry — felt itself "sovereign", travelled the "horrible route of parliamentary omnipotence" (Benjamin Constant), and lorded it over the ministers whom it expected to be its minions.[3]

b. A shift in the relations between Cabinet and Landtag occurred when Dr Held, as the leader of the strongest party, the Bavarian People's Party became Prime Minister in 1924 and had with him in his coalition Cabinet four other members of his party, one member of the German National Party and one member of the Farmers' Party It was not only inevitable, but logical that the Landtag should have started to yield heavily to the Cabinet, a development so significant under similar condi-

[2] "Of all the forms of government that are possible among mankind, I do not know any which is likely to be worse than the government of a single, omnipotent, democratic Chamber" Lecky, W E. H, *Democracy and Liberty* (New York, 1896), p. 361

[3] v Jan, *JöR* (1927), vol 15, pp. 5-8

tions in England [4] The Cabinet began to legislate with the advice and consent of the Landtag whose function became in a large part to sum up and formulate the desires of its supporters The majority had to accept the Cabinet's conclusions, and in carrying them out, became well-nigh automatic Under these conditions, the Landtag was "a transmutator that switched the political decisions, made between the Prime Minister and leaders of coalition parties and economic associations behind closed doors in a rock-bound citadel, over into the administrative apparatus"[5]

c. In the summer of 1930 irreconcilable differences manifested themselves among the three coalition parties on the question of how to cover the deficit in the budget. The Farmers' Party refused to sanction a slaughter tax, quit the Government parties and withdrew its representative from the Cabinet The opposition parties, reinforced by the Farmers' Party, did not pass the slaughter tax, and the budget had to be closed with a deficit The Government now introduced the slaughter tax on the basis of par. 64 VU, a Bavarian counterpart to art. 48 RV As the Government was now in the minority in the Landtag, this ordinance was rescinded by the Landtag through a statute which had originated in that body (Aug. 20, 1930). As the Cabinet could not dissolve the Landtag, first the Minister of Finance and then the whole Cabinet resigned. Par 66 VU. obligated the Cabinet to continue the conduct of the Government's business[6] until the for-

[4] Rogers, Lindsay, "The Changing English Constitution", *North American Review*, June, 1924, pp *765-766*

[5] Schmitt, *Verfassungslehre*, p 319, v Jan, *JöR* (1931), vol. 19, pp 2-3

[6] The Prussian constitution permitted only the conduct of "current" affairs Art 59 II

mation of a new Ministry. This duty is expressly mentioned in the Bavarian constitution because there was no organ which could entrust the resigning Cabinet with the continuance of the administration until a new Cabinet was formed The president of the Landtag offered the Socialists, as the party second in strength, the opportunity of forming a Cabinet, but against "the brute voting power" of the Bavarian People's Party they were unable to build up a coalition to overcome the resistance of the Right.

Now a miraculous solution to the acute difficulty was found, and an extraordinarily eccentric parliamentary situation developed, transgressing in interest the white-blue[7] boundary poles. What the regular Cabinet was not able to accomplish — balancing the budget — the administrative Cabinet succeeded in doing by altering the slaughter tax in some details it got the bill, under the pressure of conditions — *quid velit et possit rerum concordia discors* (Horace) — enacted into statute. The Cabinet acted as a minority Cabinet until the expiration of the life of the Landtag in 1932.

As far as the position of the Cabinet was concerned, it was advantageous The Landtag could not express its want of confidence with the attendant compulsion on the Ministry to resign, because it had resigned already; it could not exercise its right to accountability and impeachment, as the constitution did not grant these measures against ministers managing the State's affairs after their resignation. Chafe as it might under this unsatisfactory, paradoxical situation, the Landtag had no way out of this *impasse* save to form a new Ministry, but this it was unable to do. Meanwhile the Cabinet had all the

[7] Par. 1 II VU.

prerogatives guaranteed to it by the constitution and possessed *carte blanche* in affairs which were not of a financial nature and did not collide with the legislative power of the Landtag, without being "bossed" or unduly interfered with. The eminently enviable position of the Cabinet, however, did not lead the Ministry away from a perfect "constitutional morality" (Grote) [8]

In April, 1932 the problem of a "democratic government, the most radical form of 'constitutional' government, one in which there is a definite understanding as to the sphere and powers of government" (Woodrow Wilson), was referred back to the Bavarian people, empowering them to effect a change, and a radical change at that, at the polls. However, no party emerged from the elections strong enough to dominate the Landtag The Bavarian People's Party was again the leading faction (with 45 seats out of 128) Between the Bavarian People's Party, the National Socialists and the Social Democrats there have been none, or only a few, united principles and ideals as to the common weal. With grim determination, therefore, the government of Dr Held rejected a coalition with either the Marxists, on the Left, or with the Hitlerites, on the Right

In 1930 a defective constitution could have been held responsible for the dictatorship of a party. In April, 1932, after the people had voiced their will, the issue broadened immeasurably the practical aptitude of the Bavarian people to live under democracy and to insure its intelligent operation was put to the test When there is no common and cordial understanding in fundamental matters of government, "no excellence of discretion" on the part of the people, no sense of fellowship, no con-

[8] v. Jan, *JöR* (1931), vol. 19, pp. 3-4

sciousness of mutual obligations, no sensible restraint of give and take,—then Democracy cannot be "palpably extant" (Carlyle), then there is storm and stress with tragic consequences

In Bavaria there was no *pouvoir neutre et pondérateur* (Benjamin Constant)[9] to radical thought and restless spirit; the dictatorship of one party and the omnipotence of the Cabinet, composed of its members, was the fatal consequence Under those conditions Bavarian democracy came to grief in March, 1933. And so, viewing the lack of habitual soberness and temperateness of united action, Bavarian democratic history cannot be written with "lifted eyes", the sort which has an horizon and outlook upon the world.

3. ATTEMPTED REMEDIES FOR DEFECTS IN THE BAVARIAN PARLIAMENTARY SYSTEM a MINOR CONSTITUTIONAL CHANGES. The Bavarian constitution is not the *ktema eis aei* of Thucydides, nor "the most wonderful work ever achieved by the brain and purpose of man" (Gladstone). In practice it led to manifold frictions and more or less unimportant amendments, but expectations for incisive changes which many circles entertained were dispelled Statutes necessary to put the constitution into working order, to complement it, and to harmonize it with the National Constitution were enacted, e. g. statutes concerning the electoral law, referendum and initiative, the State's coat-of-arms,[10] the Staats-

[9] *Cf.* Schmitt, Carl, *Der Hüter der Verfassung* (Tubingen, 1931), pp. 132 *et seq*

[10] The large coat-of-arms has four shields, holding the coats-of-arms of the four united tribes of the Bavarians, Suebians, Franconians and inhabitants of the Palatinate The political significance of state symbols is their integrating power. This force is the psychological explanation of the longing of all communities for symbols. Graf zu Dohna in *HdbDStR* 1, p. 200.

gerichtshof, etc. Inasmuch as the constituent assembly's deliberations synchronized with those of the National assembly in Weimar, a thorough examination of the National document was not possible Consequently, divergences crept in,[11] which had to be ironed out as occasion demanded

b. MOTIONS FOR A STATE PRESIDENT IN BAVARIA. The Bamberg constitution had been adopted by all parties with the exception of the three votes of the Independent Socialists [12] The instinctive defense against a Bolshevik chaos, fear for their daily bread and apprehension for property rights led men to be satisfied for the moment with the accomplished But when tranquillity was reestablished in the country and the tension of political life relaxed, it became increasingly evident that the parties of the Right would not be satisfied with certain of the constitutional provisions

A motion sponsored by the Bavarian People's Party in September, 1921 to create the office of State president, endowed with the usual powers, was intended as an opening wedge in tearing down parts of the constitution.[13] This motion was adopted by 74 votes against 56 and, therefore, did not obtain the two-thirds majority of the Landtag (Feb 28, 1923), required by par. 92 VU.[14]

[11] E g., par 26 II VU. was in disharmony with art. 110 II RV.; the discord was eliminated through the Electoral Law and by statute of Sept. 18, 1925

[12] v. Jan, *op cit.*, p. 12.

[13] v Jan, *JöR* (1927), vol. 15, p. 2.

[14] Hoffmann, E H, "Die Stellung des Staatshauptes zur Legislative und Executive im Deutschen Reiche und seinen Ländern", *AoR* (1924), N. F. 7, p. 271, n. 49 The opposition parties were apprehensive that the presidential office might become an office of power for the governing party.

A State president in the constitutional structure of Bavaria[15] could have been more than "the emaciated shadow of the *rois fainéants*", "a mute idol in a pagoda" or a hunter of chamois at Berchtesgaden.[16] The most important function that could have been conferred on him was the right of dissolution of the Landtag. The lack of such a right on the part of any State organ was "a glaring gap in the Bamberg constitution which stamps its framing as the slip-shod work of amateurs"[17] If an assembly is not in a position to replace a cabinet which has lost its confidence by one that possesses it, an appeal to the electorate is necessary, in other words, a constitution must make provisions for an organ empowered to dissolve an assembly.

4 FRENCH AND GERMAN OPINIONS WITH REGARD TO THE BAVARIAN GOVERNMENTAL SYSTEM Bavaria, according to the will of the framers of the constitution, had parliamentary absolutism "in pure culture"[18] In fact, French constitutional lawyers say

[15] Hoch, Leo, *Ein Staatspräsident in Bayern* (Diss. Würzburg, 1931) is a monograph on the subject.

[16] All leading French authorities consider a chief of state necessary for the parliamentary régime, except B Mirkine-Guetzévitch, "Les nouvelles tendances du droit constitutionnel", *R. D. P.* (1928), pp. [illegible] *et seq.*, pp 19 *et seq*

[17] v Aretin, "Eine Lücke in der Bayerischen Verfassung", *Munchner Neuesten Nachrichten,* March 24, 1922, p. 1.

The government draft of the constitution contained a provision (par 40) that enabled the government to initiate a referendum with regard to a dissolution of the Landtag Nawiasky, *op cit*, p 79

[18] Koellreutter, Otto, "Das parlamentarische System in den deutschen Landesverfassungen", *Recht und Staat* (1921), vol. 19, p. 8.

"*Parlamentarismus in Reinkultur*" was only bearable because the Länder did not have to solve problems of weighty state affairs, but were occupied with a subordinate (provincial) administration in matters still left to their jurisdiction The same, "Der Deutsche Staat als Bundesstaat und als Parteienstaat", *Recht und Staat* (1927), vol. 51, p. 35.

Only according to the Oldenburg constitution could the ministry dissolve the Landtag. Koellreutter in *HdbDStR* 1, p. 675.

«En Bavière, il n'y a qu'une façade de parlementarisme; la réalité est un régime conventionnel compliqué de referendum et d'initiative populaire »[19]

German authors[20] stress the importance not only of parties,[21] but also of certain accessory technical and

[19] Hauriou, Maurice, *Précis élémentaire de droit constitutionnel* (Paris, 1930), p 66

Esmein-Nézard, *Eléments de droit constitutionnel français et comparé* (Paris, 1927), vol 1, pp 529-530· « *On peut douter cependant de l'exactitude de cette qualification* [gouvernement parlementaire] . . . *il semble bien qu'on doive considérer ce mode de gouvernement comme ressortant du système directoral* »

Redslob, Robert, *Le Régime parlementaire* (Paris, 1924), pp 324-333 « *La constitution de la Bavière actuelle est située sur les confins du régime parlementaire, on peut dire qu'elle n'en conserve plus que l'une ou l'autre formule* (p 324). *Quand le gouvernement n'a pas d'arme de défense . on n'est plus en présence de la responsabilité classique, mais d'une révocabilité pure et simple, degusée sous les vocables fallacieux de comptes à rendre et de vote de méfiance* (p 331) *Le type du gouvernement bavarois se rapproche le plus du modèle qui s'est développé dans la confédération helvetique* » (p 331)

Gouet, Yvon, "Qu'est-ce que le régime parlementaire?", *R D P.* (1932), p. 240. « *En Bavière c'est le Parlement qui nomme les ministres Les ministres deviennent de simples commis de la majorité et leur responsabilite politique est une simple révocabilité* »

An exception is again Mirkine-Guetzévitch, B, *Les Constitutions de l'Europe Nouvelle* (Paris, 1928), p 21 « *Le choix du ministère par la Chambre n'est en aucune façon une altération du parlementarisme , c'est, au contraire, l'achèvement du processus de rationalisation du parlementarisme Les constitutions de Prusse et de Bavière ne font que déclarer . . . ce qui se passe en fait en Angleterre et en France. En Angleterre . . . ce processus . reste un processus politique, alors que dans certaines constitutions nouvelles il est devenu un processus juridique.* »

[20] A bibliography is given in the excellent article by Werner Hirsch, "Die Stellung des Präsidenten der französischen Republik", *Zeitschrift für vergleichende Rechtswissenschaft* (Stuttgart, 1930), vol. 46, pp 4-8. *Cf.* Schelcher, Walter, "Das parlamentarische System", *AöR* (1921), N. F 2, pp 257 *et seq.*, Scheuner, Ulrich, "Über die verschiedenen, Gestaltungen des parlamentarischen Regierungssystems", *AöR* (1927), N F. 13, pp. 209 *et seq.* and 337 *et seq* Scheuner against Redslob, *loc cit*, p 349

[21] Like Esmein-Nézard, *loc cit*, vol 1, pp 241 *et seq*, 258 *et seq*, 262 *et seq*, and Barthélemy-Duez, *Traité de droit constitutionnel* (Paris, 1933), p. 181.

sociological factors for a smooth working of the parliamentary régime [22] In this sense Koellreutter declares [23] "A chief of state is not a necessary component of the parliamentary régime, — otherwise its functioning would be impossible in the German Länder . . . A strong position of a chief of state is *one* balance against parliamentary absolutism; however, a whole series of factors must be taken into consideration . . . initiative and referendum of the people, the neutrality and anonymity of the Civil Service, the position of the courts (particularly the possibility of a judicial review), economic associations (like the Federal Economic Council), extra-constitutional forces (like associations with antiparliamentarian tendencies), the relative strength of the army (always a menace to a parliament) . . . ."[24]

5. THE BAVARIAN GOVERNMENTAL SYSTEM WAS A PARLIAMENTARY SYSTEM OF THE COALITION TYPE. In case of a dispute between the executive and legislature, the executive yields to parliament in Berne

[22] It is an exception when French authors mention accessory factors Hauriou, the eminent authority in administrative law, stresses the importance of the bureaucracy as a counterweight to parliamentarism (*Précis de droit constitutionnel*, Paris, 1923, p 501, no. 1) « *Il faut considérer comme une chance la forte organization de notre régime administratif qui amène la rencontre du pouvoir de suffrage avec le pouvoir exécutif et qui, très probablement, évitera la domination des partis politiques a l'américaine.* »

Joseph-Barthélemy underscores the resistive power of the Senate (*Le Gouvernement de la France*, Paris, 1925, pp. 76-83, especially p. 80) « *Le sénat résiste . . . il reste utile comme frein Et quels instruments de destruction seraient les véhicules modernes s'ils n'avaient pas de frein!* »

[23] Parlamentarische Regierung", *Handwörterbuch der Rechtswissenschaften*, edited by Stier-Somlo and Elster (Berlin-Leipzig, 1927), vol. IV, pp 384, 387, 389

Wittmayer, Leo, *Demokratie und Parlamentarismus* (Breslau, 1928) stresses decentralization (p 103), like Laveleye, Emile de, *Le Gouvernement dans la démocratie* (Paris, 1891), vol. II, p. 117.

[24] *Cf.* Finer, *op. cit*, pp. 987 *et seq*, "Accessory Factors."

and it resigned in Munich. This difference is so fundamental that, in our opinion, no comparison between the two systems, as attempted by French authors, is possible. Nor were the referendum and initiative of sufficient relevance in Bavaria to justify an approximation of the Bavarian régime to the Swiss system. As, according to the will of the Bamberg constitution, the members of the executive body held office in Munich at the pleasure of parliament, parliamentary government existed in Bavaria. We classify the Bavarian governmental system under the coalition type of parliamentary government without further attempt at a subdivision.[25]

It may be a sterile problem and mere classificatory pedantry to let the Bavarian governmental system parade in one formal dress or another. Irrespective of the label tacked on to the Bavarian régime, the governmental system as such, however, did not go to the root of the evil of the *"Länderparlamentarismus."*[26] Passions stirred by party politics cannot be pacified by governmental systems, but can be remedied only through a healthful recovery from the morbid political conditions which have generated unbridled party strife The introduction of the Swiss system in its true form for instance, advocated in certain quarters,[27] would not in itself have constituted a salvation from the mischief of party politics A constitutional structure is no entelechy in the Aristotelian sense, but functions well only when it lays the foundation for the expression of the universality of the aims in view.

[25] Koellreutter, *loc cit*, p 389, Scheuner, *loc. cit*, pp. 379-380; Schmitt, *Verfassungslehre*, pp. 348 *et seq.*

[26] Koellreutter in *HdbDStR* 1, pp 146, 676-679. Many of the defects in constitutional government as actually operating were fairly suggested by this comprehensive, damnatory term given to a hydra-headed monster.

[27] *Ibid*, p 677.

Particularly, "democracy does not create qualities and conditions for its success, it obeys them" (Woodrow Wilson). The Diets of the Länder, having been barred from the practice of high-tension politics and the execution of ideas *de grande envergure,* could have done nothing better than control a policy of efficient and stable administration

6 THE INITIATIVE AND REFERENDUM IN OPERATION When the Bavarian People's Party was defeated in its endeavor to create the office of state president, it veered around and attempted to effect a mutation of par 92 VU, as being the key to the solution of its political ideas. As a radical dose could not be administered to sufficient members to obtain the qualified majority required by the constitution, the party resorted to the teaspoon method. Par. 92 VU ordained that changes in the constitution could be effected only by a two-thirds majority of the constitutionally elected deputies, art. 76 RV required only the presence of two-thirds of the constitutional number of members, and the assent of two-thirds of those, to the bill proposing the amendment [28] Complying with the wishes of the most powerful party in the Landtag, the Government, in the summer of 1923, introduced a bill aiming at a change of par. 92 VU in the sense of art 76 RV., also expanding the constitutional provisions in reference to the initiative and referendum and facilitating the mechanism of their operation. A two-thirds majority could not be found in the Landtag.

Frustrated in its ends, the Bavarian People's Party now — in January, 1924 — led the Right groups in the

[28] Matters would have been eased only if the opponents to the constitutional change had been "present" at the decisive vote. v. Jan, *op cit.*, p 171

introduction of an initiative to call a new Landtag which should have the power to sanction a constitutional change by simple majority. The proposals were framed in two initiatives As the Landtag resolved its self-dissolution, action on the first initiative was prevented. The statute that was demanded in the second initiative failed to pass the Landtag. Thereupon the Government set the referendum into operation A two-thirds majority of all valid votes, required by par 10 III VU., was not obtained [29] The vote on the referendum was not materially different from the distribution of votes as given to the political parties, the initiative was not more popular than the issues which were treated by the parties through the medium of the Landtag [30] The issue was not clear-cut, as it was made part and parcel of a general system of constitutionalism and ascribed to the elector capacities which he cannot possess In Bavaria, the referendum did not "open a window into the soul of the multitude" (Bryce).[31] Moreover, the newly elected Landtag rejected a constitutional amendment in June, 1924

7. A TRUNCATED PARLIAMENTARY SYSTEM BY PARADOX. The mischievous defect in the Bavarian constitution — the lack of the possibility of a dissolution

[29] Greene, Lee S, "Direct Legislation in the German Lander", *Am Pol. Sci Rev* (June, 1933), p. 453, v Jan, *JöR* (1927), vol 15, pp 3-4.

[30] "Legislation by the people was only at the beck and call of party politics, contrary to its consecration and experiences made in Switzerland" Nawiasky, Hans, *Der Sinn der Reichsverfassung* (Munchen, 1931), p. 13

[31] The People's initiative was easy to set in motion, its success was difficult The mere fact that the electors who cast a ballot evoked the belief of an endorsement of the policy embodied in the referendum acted as a deterrent on people in dependent positions. Nawiasky, Hans, "Erwagungen zu dem Volksbegehren auf Auflosung der Volksvertretung", *AöR* (1932), N. F 21, pp. 175-177 Laveleye, *loc. cit*, II, p. 159, calls the referendum *le phylloxéra du scrutin*

of the Landtag[32] and, corresponding thereto, the tenure of office by the Cabinet as an administrative board—turned the parliamentary government system into a truncated, atrophied institution, un *désordre organisé,* although the group system of parties would under any circumstances have been a formidable obstacle to the smooth working of parliamentary government Paradoxical as it might sound, the impossibility of dissolving the Landtag did not spell the omnipotence, but the impuissance of the legislature. A parliament that through a vote of lack of confidence does not eliminate the cabinet, but eradicates itself, becomes Carlyle's talking shop

8. THE ATTEMPTED REMEDY IN 1926. As an ineffective substitute for the omnipotence of parliament, the Bavarian constitution offered the self-dissolution of the Landtag (par. 31 VU), a device of great political possibilities. It was honored by conspicuous desuetude The other substitute, the referendum, was not set in motion the second time.[33]

The June, 1924 vote in the Landtag was repeated in June, 1926. It brought on the same negative result, this time due to one missing vote.[34] In view of the al-

[32] « *Le seul élément qui, peut-être, manque au régime parlementaire français, c'est la dissolution, qui permet de réaliser de grandes réformes . . . de faciliter la création d'une majorité capable de former un gouvernement de la majorité* » Mirkine-Guetzévitch, B., "La Revision constitutionnelle", *Rev. Pol et Parl* (May 10, 1933), p. 347. *Cf.* Hauriou, Maurice, *Précis de droit constitutionnel* (Paris, 1923), pp. 421-422, Schmitt, *Verfassungslehre,* pp 263, 268, 358. Dicey, A. V., "A Comparison between Cabinet Government and Presidential Government", *Nineteenth Century* (Jan., 1919), vol. 85, p 26, emphasized that the power of dissolution is "the leading characteristic" of the cabinet form of government in its normal manifestation.

[33] Prussia endowed a triumvirate with the power of dissolution. As the decisions of the triumvirate were made on party lines, the attempted solution of the problem was by no means ideal. Koellreutter in *HdbDStR* 1, p 676

[34] v. Jan, *JöR* (1927), vol. 15, p. 4.

most unchanged party strength in the Landtag, no further attempts at amending the constitution were undertaken up to the end of the Landtag's period in 1932.

Political-constitutional conditions, however, have been surface eddies above a deeper current moving more swiftly. Of much more concern to the Bavarian "States' righters" has been the actual operation of the Weimar constitution and its apprehended baneful radiation on particularistic prerogatives. "In Bavaria, the concept of 'statehood' ", wrote Heinrich von Jan, the able State Councillor of the Ministry of the Interior,[35] "the will to an independent State within the Reich, has remained unshaken The foundations for it stand as firmly as ever. The removal of the dynasty has not emasculated the 'State' idea so that Bavaria is not a mere dynastic concept, but a very real unity which cannot be passed over by conferences and *de la paperasse* "[36]

9. THE MINISTRY AS AN ORGAN OF PARLIAMENTARY GOVERNMENT. The ministry presented itself in triple form: as a collegiate body, in the person of the

[35] *JoR* (1931), vol 19, pp 1-2

"The last generation of the higher Bavarian officials had been influenced by Munich's great constitutional lawyer, Max von Seydel. His doctrines of 'federalism' wholly denied the possibility of a 'federal state', to him there were two possibilities only — unitary state or confederation To him the Bismarckian Reich was only a league of sovereign states. The spokesman of the Bavarian bureaucracy still held that opinion." Preuss, Hugo, *Um die Reichsverfassung von Weimar* (Berlin, 1924), p 102, translated by Mogi, *op cit*, p 899

[36] "The degree of unity that Bismarck had achieved Preuss saw as neither far-reaching enough nor as representative of the real national unity of the German people. Eliminate the princes, he said, and the people will speak as one nation The Revolution demonstrated clearly the extent to which he had underestimated the undying strength of German particularism. Kaiser and princes vanished overnight, but the particularist boundaries did not vanish with them The unit in terms of which many thought and acted tended to be rather the local republic than the German Reich " Emerson, *op cit.*, p. 237.

Prime Minister, and in the persons of the individual members The Bavarian constitution — similar to the Weimar constitution in this respect[37] — was deficient in precise language; at times it spoke of the Ministry when it meant the collegiate body and sometimes when it referred to an individual minister

The center of the stage was taken by the collegiate body, consisting of the prime minister and the individual ministers. In all official acts the rule of unity and solidarity prevailed, and it was as a body that the Cabinet bowed to the Landtag. From this flowed the canon that if a minister was outvoted in the ministerial council (par. 63 VU) and did not resign, he could not escape responsibility by shielding himself behind his dissident vote[38]

The general functions of the Ministry were regulated by par. 61 VU The Ministry performed the tasks assigned to it by the constitution, statutes and general ordinances Extending these duties, it arrogated to itself decisions in matters which it deemed of vital political importance (par 61, no 2 (2) VU.).[39] But the presumption favored the competence of the individual minister, as all tasks not specifically assigned to the Ministry as a collegiate body were performed by him.[40]

10 NOMINATION OF THE MINISTRY. The Ministry was nominated by the Landtag (par 58 I VU) The first step was the nomination of the Prime Minister who was chosen "with the aid drawn from authentic manifestations" of the majority parties In order to make the ap-

[37] Poetzsch-Heffter in *HdbDStR* 1, pp 512-513

[38] Rothenbücher, Karl, *Die Stellung des Ministeriums nach bayerischem Verfassungsrecht* (München, 1922), p. 33

[39] Orth, *op cit*, pp 30-31 A minister's salary was RM. 25,000 Schulze, Alfred, *op cit*, p 174

[40] v Jan, *op cit*, p 128

pointment valid, more than half of the constitutionally required members of the Landtag had to approve [41] Consequently, a Cabinet could originate only as a majority government, but it might continue, as events in 1930 and 1932 proved, as a minority government when a majority could not be found to replace it

Through nomination and acceptance, the candidate, who needed not be a Bavarian subject and for whom no restriction to a definite circle of persons existed (e g deputies),[42] attained the legal and political status of *Ministerpräsident,* although other ministers were still non-existent These were appointed by the Prime Minister, but with the assent of the Landtag (par. 58 I VU.), and a simple majority sufficed The Prime Minister submitted to the Landtag a list of the Cabinet which it could accept or decline *in toto* only. If a minister resigned without the Cabinet retiring, the assent of the Landtag to the appointment of his successor was necessary [43]

After approval of the ministerial slate by the Landtag, the Prime Minister might still alter his choice at his discretion, but the appointment of another minister again required the consent of the Landtag Nor might he shift the approved minister from one ministry to another, as the sanction of the Landtag extended to both person and office [44]

[41] By "legal number of members" was understood the seats provided for by the Electoral Law (128), inclusive of vacant seats, *ibid*, p 83

[42] v Jan, *op cit.*, p 120 The same applied to the ministers. Others, e g Rothenbücher, *op. cit*, p 38, demanded possession of German citizenship for five years (par. 68 VU.).

[43] Nawiasky, *op cit*, p 123

[44] The Irish constitution also made the appointment of the individual ministers dependent on the assent of parliament Through this measure assemblies gain the opportunity of having a more direct influence on the composition of a cabinet than it is possible, for instance, under the English system *Cf* Kohn, Leo, "Die Verfassung des Irischen Freistaats", *AöR* (1928), N. F. 15, p. 282

A constitutional problem arose when, after the dissolution of the coalition Cabinet in August, 1930, the then Minister of Agriculture retired (before the entire Cabinet) and his department was transferred, until a new Cabinet could be formed, to the Minister of the Interior. The question of the constitutionality of this procedure was aired in the Landtag because on the basis of par. 66 II VU. only state secretaries (the political representatives of the ministers) or councillors of state (the non-political, civil service functionaries) could be entrusted with a vacant ministry. The majority of the Landtag interpreted this paragraph to the effect that the constitution wanted to draw a line below, not above, so that its approval could be dispensed with in case of the administration of a vacant ministry by a minister of another department [45]

When a Prime Minister appointed a minister in proper constitutional form, he had little influence on his stay in office, except in case he retired from office himself and thereby automatically forced his ministers' resignation.[46]

Practical politics forced the Prime Minister to frame the list of candidates for the Ministry with the assent of the coalition parties.[47] They dictated to the Prime Minister the names of the candidates, selected beforehand, whom he was forced to choose [48] As the stage was set, the sanction of the Landtag was nothing more than a

[45] v Jan, *JöR* (1931), vol 19, p 5

[46] Raab, Max, *Die Stellung des Ministerpräsidenten von Bayern und der Staatspräsidenten von Württemberg, Baden und Hessen* (Diss. Erlangen, 1928), p 43

[47] Nawiasky contends that he even was legally compelled to do so (p 230)

[48] Röder, Hansfritz, *Parteien und Parteienstaat in Deutschland* (Munchen, 1930), p. 85.

beau geste; in practice, it never came to a formal vote thereon [49]

11. THE QUALIFIED POSITION OF THE MINISTER-PRASIDENT Fundamentally, the Prime Minister was on a footing with the ministers, *inter stellas luna minores* (Sir William Harcourt), and administered a department [50] Still, apart from his unique function to nominate the individual members of the Cabinet, a qualified position manifested itself in various respects. he presided over the ministerial council, had the decisive vote in case of a tie (par. 62 II VU) and received reports on all the departments, thereby creating a form of State council (par 62 III VU) These were all rights to which the individual minister was not privileged and which carved out for the Prime Minister a special niche [51] The representation of the Prime Minister took place only through a minister (par. 58 IV VU).

12 THE DUTY OF THE CABINET TO FURNISH INFORMATION. Each minister was obligated to furnish information to the Landtag as to the administration of his department (par 65 IV VU.). Neither the Cabinet as a whole nor the Prime Minister was compelled to give any departmental information This ministerial duty supplied the basis for the right of interpellation on the part of the deputies, regulated in detail by the Landtag's Rules of Procedure (par. 23 GO.).

[49] Raab, *op. cit*, p 15. The constitution mentioned only the Prime Minister and the Minister of Finance v. Jan, *op cit*, p 120

Ministers were not permitted to hold another paid office, nor were they allowed to embrace a profession or engage in private business (par 59 III VU).

[50] In contrast to the Chancellor of the Reich

[51] Raab, *op cit*, pp 16-17 But the Bavarian *Ministerpräsident* had not the political direction of the Bavarian State as the Federal Chancellor has that of the Reich (art. 56 RV). v. Jan, *op. cit.*, p. 120

The *interpellation* was a rather innocuous prescription "The Gallic circus trick" (De Lanessan) was not copied on the Isar, as the interpellation was no feature of Bavarian parliamentary procedure to precipitate a vote which the framers of the interpellation hoped would be adverse to the Ministry. As in England, no difficulty existed in getting along without any such procedure.[52]

More expeditious, and of practical value, was a measure, which presented itself in a less ostentatious garb and which was employed when information alone was wanted *brief queries* (*Kurze Anfragen*). Queries related to specific facts and required the signature of only five deputies The Cabinet responded thereto in writing within three weeks, unless it preferred to give an oral answer. It had the privilege to refuse to reply when, according to its conviction, the answer would have divulged information the secrecy of which was essential for the welfare of the Reich or any of the Lander in relation to a foreign power (par 24 II (2) GO.).[53]

In close coherence with the right of the Landtag to demand information was a second right After preliminary understanding with the individual minister the Landtag had the *right of inquisition* into the institutions and undertakings of his department (par. 52 I VU.), a right unknown to the Weimar constitution An *investiga-*

[52] *In 1928 only one interpellation was introduced to inquire what* the Cabinet had done to execute the statutes enacted by the Landtag in 1924 The Cabinet furnished the Landtag with a memorandum containing the desired information, and no further discussion ensued v Jan, *JoR* (1931), vol 19, p *6*

An interpellation was signed by fifteen deputies and handed, in writing, to the President of the Landtag *Cf.* Orth, *op. cit.*, pp. 32 *et seq.*

[53] The oral discussion of Questions took place on only one sitting day in each week and did *not* exceed the duration of the first hour (par 24 III GO)

tion of unusual affairs — irksome, ungracious — took place through a special committee (par. 52 II VU) The actual cases were few and spasmodic,[54] for the reason that "any assembly stands helplessly outside of government departments and even an investigation does not afford it more than a glimpse of the inside of a small province of the administration."[55]

13. RESPONSIBILITY OF THE CABINET The Cabinet was limited and guided at all times by the inescapable rule of ministerial responsibility to the Landtag (par. 59 VU),[56] the essence of the cabinet, or parliamentary, system For what was the Cabinet answerable to the Landtag? For the discharge of its official duties and rights according to the constitution and statutes as interpreted by the majority of the Landtag [57]

14 THE INTERROGATION WAS THE ORDINARY DEVICE to enforce the ministerial responsibility (par. 54 VU.), "neither a natural nor an expedient institution" (Bagehot) The minister, thus made answerable, was supposed to appear in person before the Landtag This

[54] Such committees were occasionally formed in 1920 for the investigation of alleged police irregularities in Munich (the committee's report dispelled suspicions of malfeasance), in 1923 an investigation of the fortress-prison Niederschonenfeld was ordered (an explanation forestalled a further investigation, as it satisfied the Landtag).

Against an abuse of the provision concerning investigating committees operated the fact that while a minority might demand the formation of such a committee (one-fifth of the members), the majority of the Landtag decided as to the manner and scope of the investigation.

This prescription corresponded partly to art 34 RV , the National constitution, however, permitted the petitioners to decide what evidence they desired v Jan, *JöR* (1929), vol 15, p 4

[55] Woodrow Wilson, *Congressional Government* (Boston-New York, 15th ed), p 271.

[56] This was the dictum of the constitution. From the standpoint of the constitution the clinical picture revealed a pathological condition long before the Nazi revolution

[57] Nawiasky, *op cit*, p 123.

duty — unique in the German constitutions — was pungently lashed by Nawiasky[58] with this bitter gibe "A sort of expostulatory inquisition shall take place? What minister with any stamina in him will submit to such a school-boy treatment? He will either at once exercise his privilege of resigning or put the question of confidence, — and then the matter glides over into the domain of a vote of want of confidence" During a debate in which the question of confidence was raised, a minister needed not be present, nor was he compelled to submit to an imprecatory procedure.[59]

15. THE VOTE OF WANT OF CONFIDENCE WAS THE EXTRAORDINARY DEVICE to hold the Cabinet or the individual minister responsible A motion to this effect required the support of at least thirty deputies, was transmitted to the Prime Minister without delay, and within five days was put down for debate (par. 55 I II VU.) More than half of the constitutional number of deputies had to manifest their displeasure in order that the vote of no-confidence was constitutionally consequential [60]

16. THE IMPEACHMENT BEFORE THE STAATSGERICHTSHOF WAS THE JUDICIAL DEVICE to enforce the ministerial responsibility (par. 56 I VU.) It could be instituted only if a minister, in the exercise of his official duties, through omissions or commissions, had wilfully or through gross negligence violated the constitution or a statute. The final vote was to be carried, on the basis of a committee report, by two-thirds of the constitutional number of deputies (pars. 56 II, 92 VU ; 25

[58] *Op cit*, p 125.
[59] Stoll, *op cit*, p. 72.
[60] Orth, *op. cit*, pp 35 *et seq*

GO). Impeachment proceedings in Bavaria might be brought against the Cabinet as a whole or against the single ministers.[61]

Besides impeachment proceedings before the Staatsgerichtshof criminal proceedings could be instituted in the ordinary courts.[62] The minister might also be held liable under the provisions of the civil law [63]

These provisions concerning an accusation of ministers were only "prophylactic". "The weakness [of such devices] lies in the difficulty in setting the machinery into motion and the penal character" (v Bieberstein).

17 PRIVILEGES OF MINISTERS. As a counterpart to the rights of the Landtag, the ministers enjoyed certain privileges, which, however, related primarily to procedural prerogatives in the Landtag They had the right to appear in the Landtag and to defend the bills of their departments (par. 65 VU) The minister or his deputy (the Landtag had no authority to demand the personal appearance of a minister for an elucidation of a bill) could insist on the sending of proposed bills to a committee for deliberation Even if a bill was not proposed by a minister, he was heard in relation thereto upon request.[64]

§15 *The Cabinet as the Chief Executive*

1. REPRESENTATION OF THE STATE The Cabinet as a whole represented the Bavarian State in relation to the Reich, other member States and foreign powers. In domestic affairs also it was incumbent upon the Cabinet

[61] In the Reich impeachment proceedings cannot be brought against the cabinet as a whole Marschall v Bieberstein in *HdbDStR* i, p 529 and 529, n 47

[62] v Jan, *op cit*, p. 112

[63] Rothenbücher, *op cit*, p 51

[64] Orth, *op cit.*, p. 44

as the chief executive organ to represent the majesty of the State and the people (par. 57 I VU).

2 EXECUTION OF LAWS AND ORDINANCES. It was the duty of the Cabinet to execute all statutes, Federal ordinances and resolutions of the Landtag (par. 57 I VU.). Art. 14 RV ordained that the Reich's statutes were to be executed by the executive organs of the Länder As to the execution of the Reich's laws the Landtag exercised a supervisory activity concurrent with the National Government The Cabinet was responsible for the proper performance of this duty, as on fundamental principles the Cabinet was answerable to the Landtag for all the spheres of its activities [1]

Ordinances or statutory rules (*Rechtsverordnungen*), "directed to the individual subjects as commands and inhibitions affecting the legal status of their liberty and property,"[2] "with no discretion in the premises,"[3] could be imposed by the Cabinet or the individual minister only on the basis of legal authorization (par. 61, no. 7 VU)

Administrative ordinances proper (*Verwaltungsverordnungen*), i e. ordinances through which the Government exercised, not the delegated power of the legislature, the law-creating power, but its own power, "by regulating the institutions and activities of the State within the boundaries of enacted law", were issued by the collegiate Ministry as the supreme directing and executive organ of the State This prerogative — "to control relations between the State and its agents, between the

[1] Orth, *op. cit*, pp 67-69.

[2] Thoma in *HdbDStR* II, p 125, Jacobi, *ibid.*, pp. 237 *et seq.* They are frequently met in Bavarian constitutional life

[3] Hart, James, *The Ordinance-making Power of the President of the United States* (Baltimore, 1925), p 55

sovereign person and its government organs"[4] (in contrasts to statutory rules which undertake to regulate relations between private persons and their fellow-men, or between private persons and the State) — was free from any dependence on the Landtag (par 61, no. 6 VU).[5]

3 THE CABINET AS THE DICTATOR DEFENSE OF THE STATE. It was the duty of the Cabinet[6] to defend the security of the State (par 64 I VU) Art. 48 IV RV. restricted the State governments to temporary measures which were necessary to restore public order and safety in cases of imminent danger[7] until the Reichspräsident's pleasure in the matter could become effective If the State police or gendarmerie were inadequate to combat disturbances or perils, assistance of the Reichswehr might be "requested", but not "ordered".[8]

[4] Thoma in *HdbDStR* II, p. 125, Jacobi, *ibid*, p 257.

[5] Emergency ordinances (par 61, no 7 VU., "provisional legislation"), ordinances with the force of law in cases where action by the legislature was considered too slow to meet impending danger, in view of art 48 RV and par 64 VU , were not imposed in Bavaria v Jan, *op cit*, p 130

[6] The Cabinet was the "State government" of art 48 IV RV (par. 64 I VU)

[7] An interpretation of "imminent danger" (*Gefahr im Verzuge*) is e. g given by Grau in *HdbDStR* II, p. 296 and 296, n 5, Poetzsch, *JöR* (1925), vol 13, pp 89-90

[8] Par 17 of the National Defense Act (*Reichswehrgesetz*) of March 23, 1921, par 88 VU

When the Bavarian Government, on Oct 22, 1923, attempted to press the Bavarian part of the Reichswehr into its service (during the conflict concerning the Ordinance of the National President of Sept 26, 1923, *cf* §3 (3b), *supra*), it clearly violated the National constitution Anschutz, *op cit*, p. 258

Even under the Weimar constitution Bavaria enjoyed a few military privileges not shared by other Länder (par 87 VU). Anschutz in *HdbDStR* I, p 300, Lassar, *ibid*., p. 318, v Freytagh-Loringhoven, *op cit*, p. 252. The Reichswehr was headed by a *Landeskommandant* Par. 86 VU was legally meaningless on account of arts. 6 (4), 47, 79 and 133 RV

In other respects a State dictatorship under art. 48 IV RV. was analogous to the dictatorship of the Reichspräsident [9]

Par. 64 VU. extended the grants given the Cabinet under art. 48 IV RV In case domestic peace and order were in imminent danger of disturbance in the fields left under the competence of the Bavarian State or in case an attack by a foreign power was threatened, the Cabinet might suspend the Bavarian constitution as a whole or in part [10] Under par. 64 VU , however, no fundamental rights of the Weimar constitution might be suspended, even if they were repeated in the Bamberg constitution.[11] The Landtag had no direct control over the exercise of this ministerial attribute.[12] A judicial review of the Cabinet's dictatorial measures as to their necessity and appropriateness was not conceded.[13]

4 APPOINTMENT OF STATE EMPLOYEES From the position of the Ministry as the chief executive organ emanated its authority to appoint the deputies to the ministers. The appointment of the other State employees was made by the individual minister for his department.

[9] Anschütz, *op cit*, pp 257-258.

[10] On the dictatorial power of the States see Nawiasky, *op. cit*, pp 203 *et seq*, Grau in *HdbDStR* II, pp 295 *et seq.*, Forsthoff, Ernst, "Der Ausnahmezustand der Länder", *Annalen des Deutschen Reichs* (Munchen-Berlin-Leipzig, 1926), Jahrgänge, 1923-25, pp. 138 *et seq.* (on Bavaria, p. 144)

[11] v Jan, *op cit*, p 133

[12] *Ibid*, p 134.

[13] The interpretation of Bavarian dictatorial state rights, vested in art 48 and par. 64 VU, played a prominent rôle in the conflicts between Bavaria and the Reich, e. g , in the controversy for the protection of the Republic, in the dispute concerning the Ordinance of the National President of Sept 26, 1923, and in the conflict concerning the wearing of party uniforms (*cf* §3, *supra*).

Concerning a domestic conflict between the Cabinet and the Landtag arising from par. 64 VU. see §14 (2c), *supra*.

The ministers' deputies were either State Secretaries or State Councillors.

Par 58 II VU. stated the norm for the substitution through State Secretaries They were attached to the ministers as their permanent political representatives and were appointed and dismissed by the Ministry upon recommendation of the department ministers, with the assent of the Landtag [14]

The State Councillors composed the topmost part of the permanent working staff which was unaffected by the rise and fall of ministries (and were comparable to the British Permanent Under-Secretaries). They were civil service employees, and as they were not responsible to the Landtag, the provisions of the Civil Service Act were applicable for their dismissal.[15]

5 THE LANDTAG'S APPROVAL OF THE INSTALLATION AND ALTERATION OF OFFICES The necessity of the Landtag's approval of the installation and alteration of offices (*Behorden*) — "institutions to which the performance of State affairs is entrusted within a definite ambit"[16] — was of importance for the conduct of the Ministry's business (par. 46 VU). Such a petty and vexatious provision was not felicitous, even if it was sensibly interpreted to mean that the sanction of the

[14] Schmelzle, H, "Der bayerische Staatssekretär", *Annalen des Deutschen Reichs* (Munchen-Berlin-Leipzig, 1927), Jahrgang, 1926, pp 361 *et seq*

The office existed not only to relieve overburdened ministers, but also, as in the case of the French undersecretaries, to provide means for harmonizing the wishes of a coalition of party groups which it was unwise to overlook The office was not found in any of the other Länder

[15] If a minister who was a civil service employee before he joined the Cabinet resigned, he was guaranteed a position similar to his old employment in the hierarchic order or a commensurate pension (par. 60 II III VU.).

[16] v Jan, *op cit.*, p. 104.

Landtag was required only in cases in which the Landtag, according to its position in the State and the nature of the contemplated installation,[17] could possibly have an interest in cooperation Practical, energetic and trustworthy statesmanship cannot be had by strict accountability alone, the essential elements of government are power and retribution for every abuse of it[18]

6 STATE TREATIES. State treaties, i. e treaties between Bavaria and other states (foreign states, the Reich, other Länder and the Vatican),[19] required the assent of the Landtag, irrespective of the fact whether they contained legal norms or not.[20] A covenant with a public law corporation,[21] if legal norms were involved, also required the sanction of the Landtag (par. 74 I VU.)[22] Administrative pacts or private law contracts were by a liberal interpretation freed from the necessity of the approval of the Landtag[23] The Landtag was not entitled to participate in the negotiations of a treaty. The Prime Minister and the president of the Landtag authenticated and promulgated state treaties (par 62 I VU.)

[17] *Ibid*, p 103

[18] This paragraph played an incisive rôle in the genesis of the school inspection law of Aug 1, 1922 The Cabinet submitted the provisions contained in the statute first in the form of an ordinance Divergences in the Landtag arose upon the question to what extent the draft of the contemplated ordinance was subject to the approval of the Landtag, as some regulations contemplated "the installation of offices" The Landtag requested that the provisions contained in the ordinance be incorporated in a bill, and the Cabinet complied therewith v Jan, *JoR* (1927), vol 15, p 46.

[19] Regarding concordats, a controversial matter, *cf.* § 5 (5), *supra.*

[20] The concept of "material law" (*cf.* Thoma in *HdbDStR* II, pp. 127 *et seq.*) is finely chiseled out in par 74 I VU Heyland in *HdbDStR* II, p 189

[21] Examples are the covenants with the Protestant Churches

[22] v. Jan, *op. cit*, p 108

[23] Nawiasky, *op cit.*, p 122.

7 NEW LOANS, STATE DEBT FUND, ALIENATION OF STATE PROPERTY As the Landtag was the fountain from which all power in the domain of finance sprang, it was natural that the Cabinet required its assent to a new loan which constituted an increase in the public debt or in the rate of interest. The assent of the Landtag was further necessary for the assumption of suretyship by the State, for an alteration in the Sinking Fund provisions or the transfer of sums set aside for amortization purposes to other uses. In so far as the Ministry was not empowered by statute to alienate real estate, it could do so only with the approval of the Landtag (par. 47 VU) [24]

8 PREPARATION OF THE BUDGET The Cabinet prepared the budget (par 48 VU) The fiscal year began on April 1 and ended on March 31 (par. 78 VU.). The Finance Minister collected the departmental estimates, to which he of course might demur, and the sum total of these estimates was submitted to the Cabinet for its approval (par. 61, nos 9-11 VU.). In plenary session the Landtag debated the budget which it was supposed to receive not later than October first (pars. 43, 48, 79 VU.). It was mandatory on the Landtag to grant estimates of expenditures in the fulfilment of legal obligations—obligations enforceable in the courts—and to cover a deficit with which the previous budget closed (pars. 79 III, 83 (2) VU) [25] To avoid a "legislative pork barrel" the Cab-

[24] Schiffmann, Franz, *Verwaltung, Veräusserung, Belastung des Staatsvermögens in Bayern* (Diss Würzburg, 1931) is a monograph on the subject

Par 25 VU prohibited joining the capital of endowed enterprises affected with a public interest (which enjoyed taxation privileges and were under state control) with the State's general assets v. Jan, *op cit.*, p 72.

[25] v Jan, *op. cit.*, p. 164

inet had the right to demand a second resolution, if a new charge or an increased charge upon the public revenue was inserted by the Landtag. The first resolution of the Landtag became effective only when affirmed by a two-thirds majority (par. 81 (3) VU) [26]

Each minister was responsible for the execution of the budgetary provisions that affected his department (par. 61, no. 10 VU), under the supervision of the Finance Minister who consequently shouldered the total responsibility (par. 61, no. 11 VU.). Without the permission of the Landtag any surplus in any one item was not transferred to another, nor might it be used to cover a deficit.[27]

If a budget was not completed in time,[28] a Temporary Budget was decreed by ministerial ordinances [29]

9 ACCOUNTING After completion of the fiscal year an accounting of all revenues and expenditures was an-

[26] In 1930 the revenues were RM. 835,629,690, the expenditures RM 857,417,290 The extraordinary budget (made up from a surplus and State loans, v Jan, p 159) was balanced with RM 136,732,958. *Handbuch fur das Deutsche Reich,* edited by the National Ministry of the Interior (Berlin, 1931), p 370 Nawiasky criticizes that revenues and expenditures were not always nicely balanced in the budget (*op. cit.,* p 492) Heckel in *HdbDStR* II, p 414, believes that the structure of the Bavarian budget permits a violation of the budgetary principle of totality (par 79 VU "*All* revenues and expenditures are to be inserted in a yearly budget . . ")

[27] Orth, *op cit*, pp 48-54 The English practice, e. g., allows greater freedom among allied subheads Finer, *op cit*, p 838.

[28] Frequently it has not been completed in time. The fault was due to the sinuosities of the financial relationship between the Reich and Bavaria and the continuous *pourparlers* relative to a financial settlement. The Landtag recognized the impossibility for the Cabinet to live up to the constitutional requirements E g the budgets of 1927 and 1928 were debated simultaneously v Jan, *JoR* (1931), pp 28-29

[29] v Jan, *op cit.,* p. 161; Schoenborn in *HdbDStR* II, p 303; Heckel, *ibid.,* p 416. Nawiasky, *op cit*, p 506, shows that it was impossible successfully to harmonize the Cabinet's ordinances bearing on financial matters with all the constitutional provisions (par. 80 II III VU)

nually rendered by the whole Cabinet to the Landtag. Vouchers, audited by the Court of Accounting,[30] were submitted *seriatim* following the structure of the budget. The Court of Accounting, after verification, established in a certified report whether any deviations from the resolutions of the Landtag had taken place [31] This report, together with the vouchers, was surrendered to the Landtag (par 84 VU.).

After acceptance of the report of the Court of Accounting by the Landtag, a discharge was given to the minister (par. 85 VU).[32] A discharge was of a political nature and did not preclude a liability in civil law or an indictment under the provisions of the penal code. If a minister resigned before a discharge was given, the Landtag had no means of holding him to account, but his civil and penal liability continued [33]

10 PROMULGATION OF STATUTES. The Cabinet authenticated and promulgated the statutes passed by the Landtag, in conjunction with its president (par. 62 I VU) [34] The right and duty of examining whether the statute to be promulgated was properly passed arose from this obligation Such an examination had both a material and formal aspect· the statute might not be *ultra vires* and had to fulfill, on the external side, the law-making requirements The authentication took place

[30] The procedure of the Bavarian Court of Accounting was antiquated and complicated Saemisch in *HdbDStR* II, p 453

[31] The Landtag passed the budget by resolution (par 79 II VU), it voted taxes by statute (*Finanzgesetz*) (par 80 VU) The most important State taxes were on real estate, inhabited houses and occupations, *cf.* Buhler in *HdbDStR* I, pp 334-335 *Cf* par 82 VU

[32] v Jan, *op cit*, p 165.

[33] Stoll, *op cit*, p 48.

[34] A unique provision, praised by Nawiasky, *op. cit.*, p. 141, criticized by Hoch, *op cit.*, pp 60-61.

at once when a state treaty or a statute was involved, not subject to a referendum (par. 77 I VU.); otherwise after three months.[35]

11. PARDONS. While the Landtag had the right to grant amnesties by statute affecting all offenders or a specific group or groups, the Ministry (or the department minister, except in cases of capital punishment) accorded pardons to individuals (par 51 I II VU.).[36]

12 THE REFERENDUM OF THE MINISTRY In certain cases the Cabinet had the flimsy prerogative of appealing within three months to the people against statutes passed by the Landtag, provided they were not enacted on the strength of a People's referendum. This right was severely delimited by a series of exceptions, enumerated in par 77 VU , e. g , it became inoperative in case the Landtag declared the measure to be urgent. By resorting to the referendum, the Cabinet was bound to lose the confidence of the Landtag. This device was therefore edendate, a bauble, "as useless as the prostate gland" (Clemenceau), particularly so since the new Cabinet might annul the appeal to the people issued by its predecessor.[37]

D. V. THE ADMINISTRATION IN BAVARIA

§16 *Division of Administrative Competences between the Reich and the Lander*

In all political organizations of the present age there is decentralization, though of course in a varying degree. The distribution of competences is more compli-

[35] After the expiration of three months it was known whether a referendum had been called or not v Jan, *op. cit*, pp 131-132

Par 75 VU. contained the regulations governing the publication of statutes and ordinances in an official gazette in German (par. 73 VU.).

[36] v Jan, *op. cit.*, p *109*

[37] Hoffmann, E H, *op. cit*, pp *276-277*

cated in a federal state, in which other territorial entities exist between the central state and the communes. These entities (the individual states of the United States, the Swiss cantons, the provinces of Canada, the Länder of Germany), juristically and politically distinguished from autonomous self-administrative bodies, aspire, on account of their existence and as a *raison d'être,* to competences permitting them the greatest possible independence and responsibility. Therefore the unitary and federal currents are additional complex factors [1]

The present local administrative situation in Germany is a *mixtum compositum* and presents problems which a reform movement has attempted to solve.[2] The significance of local history is that it is a part of a greater whole. "A spot of local history is like an inn upon a highway; it is a stage upon a far journey it is a place the national history has passed through. Local history is thus less than national history only as a part is less than the whole" (Woodrow Wilson).

The *Reich* exercised its administrative powers in three ways: directly,[3] indirectly by means of special agencies,[4] indirectly by means of the States.[5]

The *Lander* retained direct administrative powers over matters entirely within their jurisdiction, or matters over which they had concurrent jurisdiction and on which the Reich had not yet acted The internal administration and the administration of justice were the most import-

[1] Lassar in *HdbDStR* 1, pp. 301-302

[2] Thoma, *ibid*, pp 184 *et seq*

[3] Blachly and Oatman, *The Government and Administration of Germany* (Baltimore, 1928), pp 14-15

[4] *Ibid*, pp. 536 *et seq.*; pp 586 *et seq*

[5] *Ibid*, p 28, Lassar in *HdbDStR* 1, pp. 312 *et seq.* On control of the Reich over the States see, e g, Blachly and Oatman, *op cit.*, pp. 19-24, Anschütz in *HdbDStR* 1, pp. 363 *et seq.*

ant prerogatives of the Länder [6] In fact, the general internal administration[7] weakened the Reich and strengthened the State bureaucracy

In Bavaria two administrative systems ran parallel to each other: wide aggregations of self-government, exemplified by the communes, districts and counties; and an articulated hierarchy of State organs and authorities, of which each grade was supervised by a higher one (central, intermediate and subordinate authorities)

§17 *Organization of the Bavarian State Authorities*

German princes made out of their state functionaries abundantly honored, but parsimoniously paid servants, assiduously cultivated in them a sense of honor, loyalty and devotion, but generated in them, as an ugly by-product, formalistic single-mindedness and professional egocentricity (Ramsay Muir's Sins of Red Tape and Jack-in-Office) However, there was no "*chinoiserie qui embêtait le public*"; the spirit that permeated the bureaucracy was the spirit of *suum cuique*.[8]

[6] Together with the administration of the school system *Cf.* Piloty-Schneider, *op cit*, pp 229 *et seq*

[7] The security police (activities in the prevention of dangers arising from crowds (e. g riots, meetings) or individuals (e. g. vagrants)) and the local police (police activities in the aid of justice, preservation of peace and order, protection of morality and decency, etc) were the "domains *par excellence*" (Graf zu Dohna) of the Lander Ibid , pp. 102-103.

Police authorities were: the ministry of the Interior (unless a technical supervision was assigned to other ministries), the county government, chamber of internal administration, the district offices, the municipal councils in cities subject to direct county control; the directors of public safety in Munich and other cities.

Police auxiliary organs were the gendarmerie (a civil institution), the communal police ("blue police"), the State police ("green police"). Munich for instance had State police

On police orders, penal police orders and police ordinances see Blachly and Oatman, *op. cit*, pp 415 *et seq.*

[8] At the inaugural reception of the higher department employees even the Nazi Minister of the Interior Wagner paid the Bavarian

German parliamentarism has been no motive power of the ship of state. Legislative ideas have been sired by the bureaucracy out of technical knowledge; they did not emerge from the loins of the Landtag, nor did the energy of origination rest with professional and independent thinkers.

State functionaries make a distinct and attractive impression on the Germans, because they are recruited from the educated intellectuals, the only class whom the Germans instinctively recognize and respect. In a capitalistic era men can be influential without having personal riches. The members of the bureaucracy will always be the foremost (although not exclusive) candidates for the cabinet posts.

1 CENTRAL AUTHORITIES [9] The Ministry in Bavaria, the central office, was no Sanhedrin, at the beginning of 1933 it consisted of the prime minister and six departmental ministers:[10]

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bureaucracy the compliment that Bavarian State functionaries (with perhaps few exceptions) were "meticulously law-abiding and public-spirited." *Frankfurter Zeitung*, Apr. 5, 1933, p 3, *Bayerische Verwaltungblatter* (Munchen, März, 1933), 81, Jahrgang, Heft 6, pp 81-82

[9] The number of civil service employees in various capacities (teachers of primary schools included) amounted in 1927 to 0,79% of the total population in Bavaria, against 0,81% in Prussia and 0,93% in Saxony A severe curtailment in the personnel took place in the years 1924-1930 v. Jan, *JöR* (1931), vol 19, pp 20-22 Consequently, the Bavarian People's Party cannot be accused of that plague of democratic government which may be styled the employment mania

[10] On March 9, 1933, the date of the "surrender" of Bavaria to the Nazis, the six departments were administered by three ministers. The reason for the existence of a skeleton Cabinet is given in § 14 (2), *supra*.

To discuss, even in general terms, the functions of each of these departments which rendered the Bavarian people almost any kind of service offered by a modern state — "a modern state is a public service corporation" (Duguit) — would postpone the end of this treatise many pages and lead us away from our main purpose *Cf. Handbuch für das*

Ministry of Foreign Affairs,[11] Ministry of Justice, Ministry of the Interior, Ministry of Education, Ministry of Finance, and Ministry of Agriculture and Labor

2. INTERMEDIATE OFFICES. Bavaria was divided into administrative areas called counties (*Kreise*), eight in number (Upper Bavaria, Lower Bavaria, the Palatinate, Upper Palatinate, Upper Franconia with Coburg, Middle Franconia, Lower Franconia, Suebia), and these in turn were divided into 162 districts (*Bezirke*)

The county government (*Kreisregierung*),[12] the head of which was a *Regierungspräsident,* "kept steadily under the contract of a strong, capable, jawlike understanding" with a professional council, and further integrated and invigorated by the counsel of the self-governing county's committee, was an administrative agency standing directly under the Ministry. It took action as a whole in response to matters specified by law or ordinance, but conducted most affairs departmentally, through the two separate chambers that composed it, namely the chambers of internal administration and of forests, each headed by a *Regierungsdirektor* [13]

Deutsche Reich (Berlin, 1931), pp. 368-369 concerning departmental divisions and spheres of activities

[11] Bavaria had till 1933 envoys in Prussia and Saxony (in Berlin), in Baden, Hessen and Württemberg (in Stuttgart) and at the Vatican. Dr Held was Minister of Foreign Affairs from 1924 to 1933

The "Home" activities (the second division of this ministry consisted of the subdivisions commerce, industry and trade, traffic, and mining matters) and the industrial departments of the Ministry of the Interior were consolidated into a Ministry of Economics by the Nazi régime The Ministry of Foreign Affairs was suppressed

[12] Buhler in *HdbDStR* 1, p 692

[13] Chambers of finance were eliminated from the county governments Piloty-Schneider, *op cit.*, p 17, n. 1. Their business is now transacted by finance bureaus which are National offices. *Cf.* details on the Bavarian county government, Blachly-Oatman, *op cit*, pp 289-290 (but note the foregoing amendment)

3. SUBORDINATE OFFICES. The subdivisions of the county government were the district offices. The district office was the executive organ of the State Ministry and county government for matters within the district. It was the general administrative agency of this area for the internal administration of the State and had supervision over both the rural and the urban communes, except those of the fifty-eight urban communes which were placed directly under the jurisdiction of the county government.[14] The district office was headed by a *Bezirksoberamtmann*. His superiors were the county government as a whole and the minister of the Interior. He had an assistant trained in civil and administrative law (*Bezirksamtmann*) and technical subordinates (district physician, veterinary, etc.).[15]

§18 *The Bodies of Autonomous Administration in Bavaria*

New county, district and communal codes were enacted by the Landtag on Oct. 17, 1927, thereby establishing a system of coherent, symmetrical evolution in Bavarian self-government with the following guiding principles: a single chamber system, equal rights for urban and rural communes, harmonious legislation for the territories east of the Rhine and west of the Rhine, and a service relationship of public legal nature, in accordance with the provisions of the State law of officers, between the communes and persons in their service.

1. THE COUNTY. The county was a public law cor-

[14] Communes over 10,000 inhabitants upon application to the Ministry of the Interior.

[15] As the ratio of a district office to inhabitants was 1:34,000 (in Prussia 1:74,000), this was one of the reasons why the administrative expenses were proportionately higher in Bavaria than in some of the other Lander. Adametz-Mössner, *Die deutsche Verwaltungs- und Verfassungsreform in Zahlen* (Berlin, 1928), p. 149.

poration with the right of self-government (so also par. 22 VU). Its territory was the same as that of the governmental area for the performance of State functions The tasks which were incumbent upon the county in the fields of road construction and maintenance, welfare work, education of the masses and the maintenance of institutions of all sorts (medical, charitable, educational) have steadily increased in recent years [1]

The county was represented by the county assembly and county committee, except where the *Kreisregierung* was authorized to act It goes without saying that the day-to-day administrative work of the county was carried on neither by the assembly as a whole nor by its committee Even though most committee members occasionally probed administrative details, their real interest was to consider the general welfare of the county and to formulate policies aimed at promoting it The business of the county was administered by the *Kreisregierung*, and it did so free of charge, in conformity with the decisions of the county assembly and county committee.

The county government supervised the orderly management of the undertakings of the county, concurrently with the county assembly and committee, and submitted proposals to them, financial plans included,[2] but the right of the county assembly and committee to discussions and decisions on their own initiative remained unaffected by this provision

[1] Bühler in *HdbDStR* 1, p. 705, for a catalog of the county's activities see Blachly-Oatman, *op cit*, pp 319-320, Piloty-Schneider, *op cit*, pp 97-98

[2] The county's sources of income included county "rates", levied by the assembly, subventions from the State exchequer (retransfers from the Reich) and revenues from the county's assets The county rates, the "subsidiary" revenues, were added to the State taxes Piloty-Schneider, *op. cit.*, p. 99

The county assembly met once or twice a year It elected its own president and secretary for a term (formerly of five years, now of four years, par 15 *Gleichschaltungsgesetz* of March 31, 1933) and a substitute for each.[3] The county committee, headed by the president of the assembly (*Kreistagsprasident*), managed the affairs of the county for the assembly, subject to the latter's decisions in certain matters, e g., the verification of the annual accounts for the administration of the county, the levying of taxes, the borrowing of money, the creation and abolition of the county's establishments, the amount of its own compensation and expenses, etc.[4]

The Minister of the Interior exercised a stringent State supervision over the counties. "Confidence may ennoble man, tutelage retard his mentality" (Baron vom Stein), but the Bavarian State commissioned its supervisory authorities to alter or repeal decisions in conflict with legal norms and to compel the fulfilment of legal obligations and duties undertaken by the county, eventually by placing the necessary sums in the estimates. The State authorities could inspect the establishments of the county, examine the business and finance administration, and demand reports and vouchers. If a county thought that a decision injured its legal right of self-government or thrust upon it a financial obligation not founded in law, a complaint[5] was permitted against the ruling of the

[3] v Jan, *JöR* (1931), vol. 19, pp 24-25

[4] Piloty-Schneider, *op cit*, pp 98-99, Blachly-Oatman, *op. cit*, pp 322-323

[5] In an administrative procedure, the effect of a "complaint" is one of suspense, i. e the execution of the decision complained of is held in abeyance. Further, its effect is one of devolution, i e. both the facts and the legal aspect are reviewed by the higher court.

In an administrative procedure, the judge must *ex officio* ascertain the facts(art 20, Law of Aug 8, 1878), he may not content himself,

supervisory authorities before the Administrative Court.
2 THE DISTRICT. The district was the unit below the county. Its administration was a miniature edition of the county's (with slight changes) [6]

3 THE COMMUNE (*Gemeinde*) Communes — urban and rural communes being on equal footing — were defined in art 1 of the Communal Code as "corporations of public law, with the right of self-government, in accordance with the Laws" (*cf* par. 22 VU) [7]

Of the German municipal systems — "the magistracy, the Rhenish mayoralty, the communal council", and a hybrid system of two of the three — the Bavarian Communal Code chose the "communal council" system [8] Under this system, subject to the ultimate control of the State government, all authority is concentrated in a single elective body, the "council". The doctrine of the separation of legislative and executive powers (as under the "two-chamber" system of magistracy and municipal council) found no more acceptance in the Bavarian communes than in the Bavarian State government.

The organs of the commune were the mayor and the

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as in a civil procedure, with the facts as they are presented by the parties

Nor is there a prohibition against a *reformatio in peius*.

Piloty-Schneider, *op cit.*, pp. 51, 54-55

[6] v. Jan, *JöR* (1931), vol 19, p 24, Piloty-Schneider, *op cit*, pp. 92-97, Blachly-Oatman, *op cit*, pp 325 *et seq*

The district committee was headed by the *Bezirksoberamtmann*, the state functionary, not by an elected member of the assembly like the county committee In a conflict between the state government and the local government, the district's autonomous interests were taken care of by a chosen representative.

[7] The Germanic Linguistic Society assisted in the editing of the Communal Code so that the phraseology is admirable. Franz, *Die Selbstverwaltung in Bayern* (*Volksvereinsverlag*, München-Gladbach), p 18

[8] Bühler in *HdbDStR* 1, pp 699-701

communal council, called municipal council (*Stadtrat*) in the urban communes.[9]

a. THE MAYOR. The mayor was a representative of the communal council rather than an independent executive organ The bureaucracy and the citizenry were harmoniously blended; there was no stiff standing apart, bureaucratic heats and democratic distempers were avoided. Nevertheless, this system permitted the mayor, not only to reign, but also to govern [10] The German "professional" mayors have understood how to make their cities the best-ruled places in the world, "institutions of political noonday, not of the half-light of political dawn" (Woodrow Wilson) [11]

The communal council of communes with more than 3000 inhabitants engaged the services of a "professional" mayor, and, in the larger communes, of one or two additional mayors, also of paid "professional" councillors (such as a treasurer, managers of endowed institutions, of gas and electricity works, etc) In communes with less than 3000 inhabitants the mayor was elected by the communal citizens. The State authorities could veto the election.

The mayor, as the representative of the communal council, distributed the business and presided over the sittings of the council; he carried out the decisions of the council and exercised local police functions for it. The mayor, as an independent executive organ, had the power to issue emergency ordinances on his own initia-

[9] Some communes were called "*Stadtgemeinde*"; others "*Marktgemeinde*", others simply "*Gemeinde*". These were historical appellations without juristic significance

[10] Buhler in *HdbDStR* 1, p 701, n 8a

[11] "The German town of to-day is the standard bearer in intellectual, economic, and social progress" Laski, Harold J , *A Grammar of Politics* (New Haven, 1929), p 421.

tive and to settle affairs which did not permit postponement, but had to inform the council of such acts at its next meeting.

The mayor had the right to object to resolutions of the council considered by him to be illegal and refrain from their execution until the decision of the supervisory State authorities was obtained.[12] He was the head of the security police In actions of this kind, the (first) mayor appeared in the rôle of guardian of the State's interests

In a particular manner the "communal system" called for the installation of committees which partly represented the whole council and sometimes actually replaced it. One of the strong features of this system was the close working relation between these council committees and the mayor.[13]

b. THE COMMUNAL COUNCIL. The communal council represented the commune in its rights and obligations, administered its affairs, and, within its jurisdiction, imposed statutory regulations and police ordinances It consisted of five to fifty members[14] The position of councillor was honorary (Rudolf von Gneist's Archimedean point of the *Rechtsstaat*), with the exception of the technical and appointed councillors.

The sittings, to which the councillors were specially invited, were public. A resolution was passed if more than half of all councillors were present and the majority of the voting councillors favored it. The mayor might

[12] Blachly-Oatman, *op cit*, p 329.

[13] Bühler in *HdbDStR* 1, p. 701

[14] Art 1 (1) of the Bavarian Coordination Law (*Bayerisches Gesetz zur Gleichschaltung der Gemeinden und Gemeindeverbände mit Land und Reich* v 7. April 1933) reduces the maximum number of members to forty-four. *Cf* pars. 13 I and 18 of the National Coordination Law

vote on all issues, a paid councillor only on issues affecting his department.[15]

c. DELEGATED STATE FUNCTIONS OF THE COMMUNE. The commune was obligated to look after the local establishment of internal State administration, in so far as the administration was not entrusted to other authorities. The chief delegated duty of the commune was to care for the public peace, order and safety, and the execution of the laws and other provisions regarding local police functions. Only by statute, however, could the communes be compelled to cooperate in the administration of the State or in the administration of other public corporations.[16]

d COMMUNAL AFFAIRS PROPER. The communes could in principle embrace within the sphere of their activities everything which furthered the welfare of all, or the material interests and the intellectual and moral development of the individuals.[17] The autonomy of the commune upon all these domains was limited only by State supervision (*Rechtsaufsicht*). Communes needed the consent of the State authorities for some of their acts,[18] mainly those of primarily financial nature, like the establishments of banks and saving banks, alienation of real estate, etc. (*Staatskuratel*) The State also supervised the proper performance of the commune's legal

[15] Piloty-Schneider, *op. cit*, pp 71-73

[16] *Ibid*, pp 67, 71; Blachly-Oatman, *op cit.*, p 331.

[17] "The German system of laying down what a local authority may not do, and leaving it free to experiment outside that realm of prohibition, seems to me superior to its Anglo-American antithesis." Laski, Harold J., *Liberty in the Modern State* (New York and London, 1930), p 66

[18] See a catalog in Blachly-Oatman, *op cit*, pp. 331-332.

tasks (such as the construction and maintenance of roads) (*Pflichtaufsicht*) [19]

e DUAL STATE CONTROL. The State control recognized the bifurcation of the operations of the communes, those which were communal affairs proper and those which were delegated by the State (*Sachaufsicht*). State authorities were permitted to question the legality only of the communes' actions in the first category, and a dispute was brought before the Administrative Court; operations in the second category were further subject to scrutiny as to their appropriateness, and no judicial review was allowed The State supervision was generally exercised by the Ministry of the Interior, but the communal code recognized a "technical" supervision by the competent ministries in delegated affairs.[20]

The right to autonomous administration in Bavaria was more effectively put into operation in the communes than in the counties and districts where the close connections with the State administrative authorities considerably emasculated the principle [21]

[19] Piloty-Schneider, *op cit*, pp. 68 *et seq*

[20] With the consent of the Minister of the Interior a commune could unite with other communes, *ad hoc* associations, as well as with other corporations of public law for the fulfilling of individual functions Blachly-Oatman, *op cit*, p 337 Subdivisions of communes were "*Ortschaften*" Piloty-Schneider, *op cit*, pp 90-91

[21] On elections to the county assembly see Blachly-Oatman, *op. cit.*, p 321, to the district assembly, *ibid*, p 327 Elections to the communal council were regulated by the Communal Electoral Law of March 28, 1928. Seats were distributed according to the d'Hondt system *Cf* Piloty-Schneider, *op cit*, pp 75-76, also par 11 VU

Eligibility to the communal council was conditioned on prerequisites similar to those of the Landtag. The electoral period was for five years. *Ibid*, p 76

Arts. 2 and 3 of the Bavarian Coordination Law of April 7, 1933 reduce the number of members in district and county assemblies to nine and thirteen respectively and abolish the district and county committees (save special committees). The electoral period is for four years.

D VI THE JUDICIARY

§19 *The Ordinary Courts*

1 UNITY OF LAW IN THE REICH Ordinary (civil and criminal) jurisdiction was exercised by the Reichsgericht and by the courts of the States (*Amtsgericht, Landgericht, Oberlandesgericht*) (art. 103 RV) [1] Although the ordinary law to be administered by the courts, the rules of procedure in civil and criminal cases, and the provisions as to the organization of the courts had been codified under the Empire on a uniform basis for the whole of the Federation (and therefore National unity in its least questionable form, unity of law, existed), the administration of justice substantially remained with the States and formed indeed one of the most important government tasks left to them.[2]

Bavaria had a State Supreme Court (*Oberstes Landesgericht*), a relic of the former reserved sovereign rights, which in civil cases was a "small Reichsgericht"; in criminal cases is functioned as an appellate court.[3]

2. JUDICIAL REVIEW BY THE ORDINARY COURTS Unique among German constitutions was par. 72 of the Bavarian constitution.

The counties of Lower Bavaria and Upper Palatinate as well as those of Upper and Middle Franconia have been joined so that Bavaria is now divided into six counties Woerner, Otto, "Die Gleichschaltung der gemeindlichen Selbstverwaltungskörper im Reich und Land", *Bayerische Verwaltungsblätter*, 81, Jahrgang Heft 6 (München, March, 1933), p 94

[1] Par 5 was in the Bavarian constitution for the sake of completeness v Jan, *op. cit*, p. 27 *Cf* Kern in *HdbDStR* 1, pp 353 *et seq.*

[2] "The independence of the States never manifests itself more clearly than through the fact that the courts are State courts and that they dispense justice in the name of the States, not of the Reich" Dr. von Unzner, President of the Bavarian Supreme Court, during the debates of the 35th meeting of German jurists in Salzburg, *AöR* (1928), N F 15, p 395

[3] Kern in *HdbDStR* II, pp 500-501

"The Courts (also the administrative Courts)[4] examine whether a statute to be applied in their decisions is not in contravention of the constitution of the German Empire, this constitution or any other constitutional statute"

In German jurisprudence the principle was universally recognized that the legislature itself was the sole judge of its powers, the prerogative of the courts to declare the legislature's acts unconstitutional and to treat them as null and void was not conceded, nor was such a right exercised in practice. In contrast, the Bamberg constitution set forth the principle that "the constitution was in fact and was to be regarded as the fundamental law" (Hamilton) It therefore belonged to the judiciary to ascertain its meaning as well as the purport of any act proceeding from the Landtag. If there were a disagreement between the two, the constitution was to be preferred to the statute; the intention of the people to the intention of their agents The norm laid down by par 72 VU., so startingly revolutionary in German written constitutions, also bound the National courts sitting in Bavarian cases and judging them on the basis of Bavarian statutes.[5] "The Bavarian par. 72, however, was without significance", says Thoma emphatically and correctly,[6] "for the relation of the courts to National laws."[7]

[4] v. Jan, *op cit.*, p 145.

[5] Thoma, Richard, "Das richterliche Prüfungsrecht", *AoR* (1922), N F 4, pp. 283-284

[6] *Ibid*, p. 284, v Hippel in *HdbDStR* II, p. 559.

[7] The authority of the courts in refusing to give effect to National statutes deemed by them to be *ultra vires* has been a matter of spirited controversy An anthology of opinions is given by v. Hippel in *HdbDStR* II, p 554, no. 32 The civil division of the Reichsgericht declared that, notwithstanding the silence of the constitution, the courts were competent to pass on the question of the constitutionality of National laws (Nov. 4, 1925), *RGZ* 111, pp. 320 *et seq.*

In American literature the subject has been treated by Friedrich, Carl Joachim, "The Issue of Judicial Review in Germany", *Pol Sci. Quar*, June, 1928, and Blachly and Oatman, "Judicial Review of Legislative Acts in Germany", *Am Polit. Sci. Rev*, Feb., 1927.

§20 *The Bavarian Administrative Courts*

Art 107 RV. provided that there should be administrative courts in the Lander for the protection of individuals against orders and decrees of the administrative authorities. The essence of administrative adjudication in Bavaria has always been seen in the fact that the decision of controversies between the administration and individuals relative to the rights of the former and the counterrights of the latter was not exercised by the ordinary courts, but by special courts. Administrative adjudication is not a mere part or specialty of the ordinary courts, a division thereof, rather it is a legislation *sui generis*, which, irrespective of extensive resemblance in regard to structure and procedure, forms a counterpart to the ordinary courts [1]

The competence of the Bavarian administrative courts was limited to suits which were enumerated in the Law of Aug. 8, 1878 (*Verwaltungsgerichtsgesetz, VGG.*) and subsequent amending statutes A classification into two groups was undertaken depending on the number of legal instances involved,[2] "matters of administrative law" (*Verwaltungsrechtsachen,* art. 8 VGG.)[3] and "contentious matters of the second order" (*Verwaltungsstreitsachen zweiter Ordnung,* arts 10-11 VGG).[4] The competence of the administrative courts did not encompass legal matters properly belonging to the civil and criminal courts (par. 69 IV VU), nor administrative matters,

[1] Anschütz, *op. cit*, pp 435-436
[2] Piloty-Schneider, *op. cit*, p. 32
[3] *Cf* a catalog, *ibid*, pp. 33-34
[4] *Cf*. a catalog, *ibid*, pp 35-36

which the administrative authorities could decide within the limits of the constitution at their own discretion.[5]

Administrative courts of the first instance were the district offices or the administrative senates of the fifty-eight communes subject to direct county control, the first deciding bureaucratically, the latter through a college of five members Administrative courts of the second instance were the *Kreisregierungen,* sitting as administrative senates of three members. The highest court was the Administrative Court in Munich, rendering its decisions through senates composed of five members.[6] Its members were judicial authorities as independent as the aristocracy of the robe of the ordinary courts (art. 2 VGG.; pars. 71 II, 5, 57 II, 61 (5), 69 I VU).

§21 *The Bavarian Court of State (Staatsgerichtshof)*

1. COMPETENCE The Bavarian Staatsgerichtshof was competent (Law of June 11, 1920, as amended by Statute of Sept 18, 1925) .[1]

(1) in impeachment proceedings against a minister (par 56 I VU.);
(1a) in proceedings of the Landtag against deputies (par 41 III-VI VU);
(2) in constitutional complaints (*Verfassungsbeschwerden,* par. 93 VU), initiated by German citizens or juristic persons (of private or public law), having their domicile in Bavaria, if they believed themselves to have been injured through activities of Bavarian authorities, in contravention of the constitution The complaint could be presented only after the complainant had failed to obtain satisfaction from the Ministry or after he had exhausted the right of appeal to a higher court

[5] *Ibid*, pp 30-31 The complaint filed with the Staatsgerichtshof in case a person believed himself to be injured in his rights as to his personal liberty and property was a substitute for a deficient administrative review of Bavarian police orders *Ibid.*, pp. 115-117 Genzmer in *HdbDStR* ii, p 512.

[6] Piloty-Schneider, *op cit*, p 38.

[1] The activities of the Bavarian Staatsgerichtshof were suspended by statute of June 27, 1933 (*Gesetz- u Verwaltungsblatt für den Freistaat Bayern,* #26, July 25, 1933)

(provided the verdict of the court left room for a decision as to the question of a constitutional infraction),[2]
(3) in constitutional controversies (*Verfassungsstreitigkeiten*) between the Landtag and the Cabinet (par 70 I VU).

2 COMPOSITION. The Staatsgerichtshof was composed, in the case under 1, of the president of the Supreme Court, eight judges, of whom three were members of the Administrative Court, and ten members of the Landtag,[3] elected for the legislative period by the Landtag by a two-thirds majority of the members present. In the other three cases, the president of the Supreme Court, three judges and five parliamentarians sat.

3. A CAUSE CELEBRE. By way of illustration we cite the history of a case which occupied the Staatsgerichtshof and which was of interest from a political standpoint

Before the statute of March 3, 1931 amended the then

[2] v Jan, *JöR* (1927), vol 15, pp 18-19. Lammers-Simons, *op cit*, cite in vol, III and vol. IV. (1931, 1932) 46 and 8 decisions, most of which are based on constitutional complaints *Cf* §4 (2), *supra* None of the other Länder had this procedure (Friesenhahn in *HdbDStR* II, p 532) There are no cases on record involving proceedings against a minister or deputy

Various opinions of the value of constitutional complaints by authority of par 93 VU are cited by v Kress, Georg, "Die Verfassungsbeschwerde zum Bayerischen Staatsgerichtshof", *Annalen des Deutschen Reichs* (Munchen-Berlin-Leipzig, 1931), pp. 259-261 Verdicts in favor of the complainant were the exception v Kress says (p 261) "Par 93 is one of the few concessions which the Constitution of Aug 14, 1919 makes to modern times, in general, the authors of the constitution have woefully neglected two modern postulates a strong government, capable of action, and an independent citizenry, inviolable within its legal spheres"

Cf Professor Koellreutter's criticism in *AöR* (1932), N F 21, p. 463

The Staatsgerichtshof decided on the legality or illegality of an official's act in an individual case, it did not annul the act (par 47 StGHG., v Jan, *op cit*, p 238) and had no power to enforce its decision, but relied on the Ministry to grant redress No pecuniary claim might be presented (Lammers-Simons, *op. cit.*, vol. III (1931), p 135), nor a petition with regard to the activity of an administrative authority as a "fisc" (Lammers-Simons, *loc cit*, p 138, par 69 V VU)

[3] v. Jan, *op. cit.*, p. 144.

prevailing electoral laws, many controversies raged in the Landtag in connection therewith that led to a congeries of disputes aired in both the National and the Bavarian Courts of State. A particular stumbling block was a provision in the electoral laws pertaining to the election of fifteen deputies-at-large The provision creating them was found to be unconstitutional by the Bavarian Court, as, according to its decision of Feb 12, 1930, a double evaluation of votes in favor of the larger parties took place in so far as the selection of the deputies was made by the party leaders after the election, and not through direct suffrage as constitutionally prescribed. It was assumed by both Cabinet and Landtag that the invalidity of the paragraphs in the electoral laws was established by the verdict of the Staatsgerichtshof and did not exist at the time of the passage of the statute. The construction *ex nunc,* not *ex tunc,* was placed on the court's decision, of course, in order not to invalidate all acts passed by the Legislature for the period between the election and the rendering of the verdict. Deficient state acts, the Cabinet argued, performed with good faith in their validity, must remain effective in the interest of public order and security, even if their legal basis later appears to have been unsound.[4]

In its decision of Feb. 26, 1931 the Bavarian Staatsgerichtshof held that the prerogative of the Landtag to continue to function was not unlimited and that a prolongation of the life of a deficiently organized assembly is predicated on the establishment of a constitutional status within a reasonable time, upon due consideration of all "legal, factual and political conditions and diffi-

[4] Wenzel in *HdbDStR* 1, pp. 618-619; Lammers-Simons, *op cit*, vol. iii (Berlin, 1931), pp. 111 *et seq*

culties." In its opinion the Court gave directions for the future, of a theoretical nature, thereby arousing the Landtag to violent opposition.

Can a court lay down prescriptions to an assembly as to the degree of alacrity with which it has to undertake the amendment of a statute? Can it threaten an assembly with legal consequences in case of a negligent performance of its duties? May not judicial discretion interpret "political conditions and difficulties" differently from an assembly? An overstraining of judicial powers scarcely can be conducive to quiet and the simplification of political life. It is rather creative of the highly undesirable possibility that matters, after they have left the heat and dust of the legislative arena, may again be the subject of violent passion in the judicial forum

The Landtag refused to be terrorized by these rigid, specified, dated arrangements In a resolution of June 9, 1931 it declared that the jurisdiction of the Staatsgerichtshof extended only to a decision in a constitutional controversy *in lite* and that it exceeded its powers when it gave directions to the Landtag in a hypothetical case.[5]

4 EXCLUSIVE COMPETENCE OF THE BAVARIAN STAATSGERICHTSHOF IN CONSTITUTIONAL CONTROVERSIES ARISING WITHIN BAVARIA When the case above discussed was before the National Staatsgerichtshof, the Bavarian Government contested the competence of the court, alleging the competence of the Bavarian Court. In its pleadings the Bavarian Government maintained that the Bavarian constitution in par 70 regulated constitutional controversies[6] generally, al-

[5] v. Jan, *JöR* (1927), vol. 15, pp 12-16, *JoR* (1931), vol 19, pp. 10-19, Lammers-Simons, *op. cit*, vol iv (Berlin, 1932), pp 329 *et seq.*

[6] I e controversies in which the disputant was required to prove that his right of participating in the formation of the State's will or

though in the Bavarian Law of June 11, 1920 regulating the Staatsgerichtshof, in par. 2, only controversies between the Landtag and Cabinet were specifically enumerated The National Staatsgerichtshof accepted this view in its decision of Jan. 19, 1929 Consequently, there was no subsidiary competence of the National Staatsgerichtshof based on art. 19 RV. for a decision of constitutional controversies arising within Bavaria.[7]

§22 *The Court of Conflicts*

With two sets of courts operating in Bavaria — the *Oberstes Landesgericht*, which was the tribunal of last resort in all ordinary cases (both civil and criminal), and the *Verwaltungsgerichtshof*, which was supreme in all administrative controversies — there was at times a conflict of jurisdiction. Neither of these courts was superior to the other; each was highest in authority within its own sphere. If the ordinary and administrative courts could not agree as to which should have jurisdiction in any case, the matter went to a court of conflicts (par 69 III VU) composed of four judges delegated by the *Oberstes Landesgericht* and three judges by the *Verwaltungsgericht* In its decision, the arbitral court for jurisdiction was guided by the consideration whether or not the facts of the case were founded on civil or

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in the exercise of political power (Staatsgewalt) was infringed They concerned the interpretation and application of the constitution

The Staatsgerichtshof, in its decision of Feb 6, 1929, defined constitutional complaints and constitutional controversies. Lammers-Simons, *op cit*, vol iii, p 151

« *En France, par application de la théorie des actes de gouvernement, ces litiges [litiges constitutionnels] n'ont pas de juge.* » Barthélemy-Duez, *op cit*, p 213

[7] v Jan, *JöR* (1931), vol. 19, pp. 11-12 *Cf.* Emig, Kurt, "Ist der Staatsgerichtshof fur das Deutsche Reich zur Entscheidung uber bayerische Verfassungsstreitigkeiten zuständig?", *AöR* (1928), N. F. 14, pp. 68 *et seq.*

public law (Statutes of Aug 18, 1879 and Nov. 2, 1912) [1]

E. POLITICAL PARTIES IN BAVARIA

§23 *The Position of Political Parties in the Weimar and Bamberg Constitutions*

Democratic ideology denies a party state, sociological reality affirms it, and the constitutional jurisprudence of democracy oscillates between an affirmative and negative position It is still the rule that constitutions ignore the presuppositions of their efficacy. The effective organization of party life represents a sociological manifestation without a juristic concept Parties are the power behind the throne [1] Without them the electorate would be atomized. Yet to-day, parties are the pariahs of the constitutional family [2]

Art. 21 RV and par 35 VU, "fossil petrifications inherited from the constitutional history of the stone age" (Morstein Marx), decree the deputies to be representatives of the whole nation, amenable to their conscience only, under bondage to no *mandat impératif*, as if it were possible, "by some leger-demain of governmental wizardry, accompanied and supplemented by a rehabilitation of the virtues least commonly controlling fallen human

[1] Piloty-Schneider, *op cit*, pp 27-30

The decision in a *positive* conflict of competence (both the civil court and the administrative authority declare themselves to be competent — in Bavaria, these cases have been rare) either affirmed the competence of the ordinary courts or denied it A judgment in a *negative* conflict of competence (both the civil court and the administrative court refuse to assume jurisdiction) assigned the jurisdiction to either an ordinary court or an administrative court *Ibid*, pp. 28-29.

[1] « *Le régime parlementaire n'est en somme que l'organisation constitutionnelle de la lutte des partis pour la conquête des pouvoirs. Les partis sont le ressort essentiel et principal de ce régime; sans partis pas de régime parlementaire.* » Joseph-Barthélemy, *L'Introduction du régime parlementaire en France sous Louis XVIII et Charles* X (Paris, 1904), p 145.

[2] Radbruch in *HdbDStR* 1, pp. 285-288, Röder, *op cit*, p. 8

nature" (Woodrow Wilson), to do away within the assemblies with parties and party coercion, and outside of the assemblies with party bosses and the electorate and their psychological pressure on the parties in parliament Art 130 RV contains the same idealistic notion when it expects the members of the government to be servants of the whole nation — government officials rebel *a priori* against this classification of Frederick the Great —, while the government of a party state is called into being just to execute the political will of these parties. This paragraph, the only paragraph which mentions the word "party", characteristically does so, as Wittmayer says,[3] who frequently clothes the bare bones of the law in the utmost felicity of phrase, "with a negative gesture of demure defense"

Perhaps the ignoring of parties in the Weimar and Bamberg constitutions was less rooted in the ideology of German democracy than in the inherited ideology of the autocratic state, inconsequentially adhered to by the new state. The autocratic state, not dependent on a majority of parties in the assemblies for its support, had as its necessary foundation the creed "in a watch from a higher tower than 'factions' swaying pinnacles" (Freiligrath) In reality, however, the government of the autocratic state was a crypto-party government, distinguished from genuine party government only through the invisibility of its political fulcra, an esoteric mechanism of intramural diplomacy.

Though we do not encounter the parties on the main street of the constitutions, we meet them in the legal alleys, sometimes dimly lit. If the constitutions locate the sovereignty in the people as a whole, sovereignty

[3] *Die Weimarer Reichsverfassung* (Tübingen, 1922), p 64.

emanates in the electoral laws from the people separated into parties. Proportional representation, in its final analysis, signifies that not the individual candidates are elected, but the party by which they are offered for election.[4]

Behind the electors parties appear in the electoral laws with increasing clearness; so, for instance, the Bavarian Electoral Law, in arts. 46 II and 51 II, speaks of a party symbol on voting lists. The rules of procedure governing the Bavarian Landtag are also conceived in less prudish spirit, they accord parties official recognition under the style of "*Fraktionen*", defined in par. 8 GO as "parliamentary associations"

Even after Germania had left her Procrustean bed of autocratic ideology, the ethics of the citizens still condemned a minister who was accused of indulging in party politics [5] This notion, a fatal legacy, was the nebulous German interpretation of government as a political and as an administrative activity [6] But Poincaré's apothegm · « *Il n'est pas douteux qu'en général les habitudes sont plus difficiles à redresser que les lois à corriger* » also holds incontrovertibly true in this phenomenon, this conception is inherent in the German nation as strongly as its group consciousness As the autocratic state ele-

[4] Triepel, *Die Staatsverfassung und die politischen Parteien, Rede bei der Universitätsfeier, Aug 3, 1927* (Berlin, 1928), p. 25

[5] Radburch, *loc cit*, p 293

[6] The following scene in the Bavarian Landtag (sitting of Aug 20, 1930, *Stenographische Berichte* (München, 1930) #90, p 592) is characteristic

Deputy Ackermann (Socialist) "To-day Dr Schmelzle did not speak in his capacity of the State minister conscious of his responsibility and the circuit of his prerogatives, but rather in that of the angered member of the Bavarian People's Party . "

The President of the Landtag "If you have inferred that the Minister of Finance swerved from the road of justice and objectivity on account of his party affinity, I criticize the reproach "

vated state officers to ministers, so the constitution demoted the minister to a state official and applied art. 130 RV. to him also.[7]

No domain of constitutional life opposes to the normative will of statutes such vigorous autonomous legalism as the party system. The inherited party system of the autocratic state had, during the transition into a republic, so much resistive power that the rigid parties of the Kingdom glided over almost without change into the People's state with its totally different demands on party mobility.[8]

§24 *The Landtag as the Arena of a Pluralistic System*

German parliaments, the opponents of the old militaristic and bureaucratic state, were "epitaphs rather than prophecies" at a time when their victory seemed to be complete. Concomitant with the elimination of the old state, German parliaments disintegrated.

A brittle association, a temporary and loose complex, at liberty freely to solicit its members, — that is the criterion of a "party" in the liberal-constitutional state which the Weimar and Bamberg constitutions wanted to erect. "Freedom" and "solicitation" conceptually prohibit any social and economic pressure and admit as motivation only the untrammeled persuasion of socially independent and intellectually self-reliant citizens. The region in which parties may move if they are allowed to exist at all, as Preuss repeatedly and emphatically pointed

[7] "In Germany the most respected organization will always be the bureaucracy because the recognition of its technical and professional work lies in the instinct of the nation It is just as natural that the ministers ordinarily spring from this class as that in pugnacious England the battling parliamentarians advance to the rank of ministers." Dibelius, Wilhelm, *op. cit.*, p. 218

[8] Radbruch, *loc. cit.*, pp. 293-294

out, is the sphere of public opinion. He regarded public opinion as superheated gaseous matter, devoid of consciousness of direction. The Weimar and Bamberg constitutions share this concept. Instead, German parties were adamant, well organized formations, equipped with an influential bureaucracy and a standing army of paid functionaries, in which there was a compact clientele united by common intellectual and economic ties and interests Before Adolf Hitler erected his "totalitarian" state, there were in Germany social party aggregations, each having a comprehensive program of civilization, each aspiring to totality Their coexistence created and carried on a pluralistic state.[1]

The concept of "party", as the bourgeois-liberal state defined it, paled in the course of a decade. The Staatsgerichtshof, in its decision of July 7, 1928[2] significantly said. "Only such aggregations of persons may be regarded as political parties in a procedure before this court which, through their activities, potentially influence an election result. Parties presuppose a fairly numerous membership to attain political ends They are entities, of a calculable duration, to which a certain compactness cannot be denied; they may not be 'loose groups', as otherwise proportional representation would be unworkable". A scrutiny of the decision reveals that not only the concept of "party", but also the concept of "election" underwent a fundamental change. In fact, "on the one hand, electoral proceedings were nothing but a mechanical grouping and distribution of the electorate, a statistical apportionment of the state into several firmly

[1] Schmitt, Carl, *Der Hüter der Verfassung* (Tübingen, 1931), pp. 82-84.

[2] RGZ 121 annex p. 8, Lammers-Simons, *op. cit*, vol. 1, pp. 309 *et seq.*

organized social complexes, on the other, they were appeals to standing army parties and therefore plebiscites, no longer 'elections' of deputies and representatives of the people in the traditional sense "[3]

It is a guiding principle of all constitutional institutions of a parliamentary democracy, and of course also of the system of the German constitutions, that the diversity of individually egotistical interests and opinions shall, by way of a rally in party wills, coalesce into the higher unity of the state's will. A party, therefore, must not be all ballast and no sail, as otherwise the resistance to a transmutation of the party will is too strong. Parliament shall be the arena of a recasting process where a multiplicity of social, cultural and confessional disunities are melted into the unity of a single political will Due to the rigidity of the German party formations and, further, due to the German multiple party system, party wills did not interpenetrate nor telescope into the great conflux of a united state will The tactical reserves, the half-surrenders, the easy tolerance which are necessary for the smooth and patient evolution of the British political system were not characteristic of the genius of the German nation A nation of realists lost its sense of reality in the face of questions of statesmanship and politics The German schools of thought tended toward neat divisions and reciprocal exclusions which distrusted "compromise and barter."[4] A plurality of loyalties was engendered which stabilized the pluralistic division of the state and progressively obstructed the formation of the state's unity [5]

[3] Schmitt, *loc cit*, pp. 84-85
[4] *Cf* §14 (2c), *supra*
[5] Schmitt, *loc cit*, pp 87 *et seq*

While it is the essence of every constitution to create a universal ground for the rendering of political decisions which do not question the common constitutional basis, a diversity of legal standards sprang up and destroyed the respect for the constitution. When the spiritual basis of the parliamentary system — faith in the existence of a common foundation for discussion and therewith the possibility of a dialectic agreement with the political adversary without resorting to brute force— was removed, when, in short, social homogeneity was lost,[6] the time had become ripe for a dictatorship.

§25 *The Bavarian People's Party*

1. CHARACTERISTICS OF THE BAVARIAN PEASANT. "The Bavarian people", says Aventinus, the Bavarian Herodotus and great historian of the Reformation, "is religious, plain and just. It is fond of participating in Church processions, for which the occasions are plentiful, and is more devoted to farming and cattle-raising than to war. It carouses, procreates prolifically, loves its homestead, is somewhat unfriendly and obstinate, as it does not travel around much It despises merchants, and in the country there are few who are engaged in a fair-sized trade. Day and night the common man keeps wassail in the taverns, sings, dances, gambles, goes around with bear-spears and long knives, attends extended and

[6] Heller, Hermann, "Politische Demokratie und soziale Homogenität", *Probleme der Demokratie* (Berlin-Grunewald, 1931), Heft 5, p 40

Cf Rocco, *op cit.*, p 25 « *La pratica constituzionale aveva da lunghi anni modificado lo Statuto, dando sempre più al Parlamento e per esso alla Camera elettiva, la somma dei poteri Tale sistema potè, bene o male, funzionare, finchè vi fu nella Camera una maggioranza relativamente omogenea e capace di esprimere dal suo seno un Governo omogeneo Ma, quando con la imprudente introduzione della rappresentanza proporzionale nel sistema elettorale, nessun partito ebbe più la maggioranza, la crisi divenne irrimediabile* »

needless marriage-ceremonies, funeral-meals and country-fairs But he is honest and blameless and harms nobody."[1]

Do we not recognize, almost trait by trait, in this description of four hundred years ago, the Bavarian peasant of to-day?

Despite his forceful, descriptive way of expression, not the least in quarrelsome bandying of words, he displays a remarkable awkwardness of speech, continues Professor von Müller[2] There is in his character a strange amalgam of typically Bavarian restrained meditation and balanced fairness with an almost Southern quick temper, a passionate ire and a daredevil dash which have made him in all centuries a lusty brawler and a brave soldier.

A genuine political nature is not made of such stuff The Bavarian tribe has produced few political talents. It is a rare case indeed in Bavarian history when in a decisive hour like the Reformation as outstanding a native Bavarian statesman as Leonhard von Eck was at the helm. Montgelas was by birth only a half-Bavarian, by temperament even less. Nevertheless, there is in the Nation as a whole, as one and a half thousand years of history have demonstrated, a strong state-forming and state-sustaining force.[3]

2. CLASSIFICATION OF THE BAVARIAN PARTIES.

In what parties did the political thought of this non-politically minded people crystallize between 1919 and 1933?

[1] K. A. von Muller, *Das bayerische Problem in der deutschen Geschichte* (München-Berlin, 1931), pp 25-26

[2] *Ibid*, p 26.

[3] *Ibid.*, pp 26-28

We divide the parties into three groups:

Bourgeois[4] parties of the Right.[5]	National Socialists, German Nationalists, German People's Party, Bavarian People's Party.
Bourgeois parties of the Left:	German Democrats,
Socialists:	Farmers' Party (till 1932) Majority Socialists, Communists.

[4] « Qu'est-ce qu'un bourgeois? C'est quelqu'un qui a des reserves » (André Siegfried)

[5] German parties of the Right stressed, in a varying degree, "the national idea" What is understood by this concept? The national idea, aiming as it does at a "central group, embracing all purposes in life" (Rümelin), if it does not want meekly to surrender the core and be contented with the husk, must mean "Assertion of the uninterrupted community of a people in all its essential phases of existence, strife for the sustenance of its peculiar nature, speech and custom, defense of all its goods, its honor as well as its country" (Meinecke)

The power of nationality "does soften and inhibit the potential violence of man to man, spurs the citizen to public devotion and surrender, and clothes certain duties and rights with the quality of spontaneous naturalness it is cultivated, worshipped of set purpose, for it is seen that without it, the egotisms in society would come the nearer to breaking society to pieces" Finer, *op cit.*, p 32

« *En France la droite, ce n'est pas seulement — ni-même essentiellement — les conservateurs, mais l'Eglise.* » Siegfried, *Tableau des partis en France* (Paris, 1930), p 124

Ferments of national decomposition in Germany have been· "Political fissure and particularism, the confessional cleavage, the internationalism of Judaism, more represented in Germany than in other occidental states, the enormous number of industrial workers and their permeation with Marxian theories" v Below, "Deutsche Reichspolitik, einst und jetzt", *Recht und Staat* (1922), vol 23, p. 47, n 1

Composition of the Bavarian Landtag

	1919	*1920*	*1924*	*1928*	*1932*
National Socialists			23	9	43
Nationalists	9	19	11	13	3
German People's Party				4	
Bavarian People's Party	66	65	46	46	45
Center			1		
Democrats	25	13			
Farmer's Party	15	12	10	17	9
Socialists	62	27	23	34	20
Independent Socialists	3	20			
Communists		2	9	5	8
Various			6		

All these parties were National parties, with the exception of the Bavarian People's Party and the (Bavarian) Farmers' Party We shall content ourselves in describing *le parti du cru,* the Bavarian People's Party.[6]

3 THE BAVARIAN CENTER PARTY BETWEEN 1871 and 1918. Before 1870 two great groups of parties were pitted against each other in the Kingdom of Bavaria. on one side the "patriotic" particularists, eager to maintain a magnificent independence of their country, on the other the Liberals, favorably disposed towards German unity and consequently towards Prussia. After the proclamation of the Empire these two parties continued the fight for supremacy as in the preceding years. The conflict abated in severity with a progressing prosperity in the Kingdom, but it remained a potential force even during periods of tranquillity and was forcibly pushed to the front every time that vestigial remnants of the State's independence seemed menaced The one notable force that entered as a disturbing element into these two major political issues was the child of modern industrialism, the Socialistic party, though it never attained a decisive position till the Revolution, it, nevertheless, helped swell the ranks of that group whose political ideal it happened to approximate.

Several factors gradually contributed to make the Catholic party, which had assumed in 1880 the name of Bavarian Center Party, dominant The Catholics form about two-thirds of the total population of Bavaria[7]

[6] With regard to the National parties we refer in English literature to Finer, *op cit*, pp 558 *et seq* The richness and subtlety of Finer's description of German parties is admirable

[7] In 1925 there were in Bavaria Catholics 5,163,106, Protestants 2,126,438, other Christians 6,686, Israelites 49,145, others 34,219

Par 17 VU. regulates an individual's freedom of belief and worship.

The king, as well as his family and its branches, belonged to the religion of the majority of his subjects, and the royal family did not hesitate to show that it was loyal to the Church the Corpus Christi ceremonies in Munich were grand religious-regal spectacles of "barbaric pomp" An old tradition assisted the Catholic movement From the time of Duke William IV, who rejected the Reformation, the Bavarian state submitted to Rome Till the beginning of the nineteenth century the state busied itself with the religious practices of its subjects and submissively placed its forces at the disposition of the Church Catholics received preferential treatment in public offices, the schools were in the hands of the clergy, mixed marriages were prohibited. Only in 1808 did Count Montgelas, the great Bavarian statesman, proclaim liberty of conscience But the concordat of June 5, 1817, supplemented by a royal decree of Tegernsee of Sept. 15, 1921, restored the Catholic Church to an eminently enviable position.[8]

The Center had a first-class party organization. It had the all-powerful backing of the bishops whose mandates to the laity strongly influenced the opinion of the faithful The clergy constituted an extra-parliamentary propaganda machine, unrivalled in efficiency The "chaplaincracy"[9] did not hesitate openly to urge the election of Catholic deputies from the pulpits. A vast army of ecclesiastics did their bidding [10] Party newspapers, often

[8] Rovère, Julien, "L'Opinion et la vie politique en Baviere de 1871 à 1914", *Revue des sciences politiques* (Paris, 1920), tome 43, pp 321 *et seq*

[9] "Kaplanokratie" Max Weber, *Parlament und Regierung* (München- Leipzig, 1918), p 24

[10] Rovère, *loc cit.*, p 330 "In no other country of Europe, except Belgium, do the priests take such an active part in politics" Lowell, A Lawrence, *Government and Politics in Continental Europe* (Boston, 1896), p 339.